SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 440.

OKLAHOMA RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

SEVERNS PAVING COMPANY AND THE CITY OF OKLAHOMA CITY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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a-2 In the Supreme Court of the United States of America.

OKLAHOMA RAILWAY COMPANY, a Corporation, Plaintiff in Error,

vs.

SEVERNS PAVING COMPANY, a Corporation, and THE CITY OF OKLAHOMA CITY, a Municipal Corporation, Defendants in Error.

Filed Mar. 29, 1918. William M. Franklin, Clerk.

UNITED STATES OF AMERICA, *ss*:

To the Severns Paving Company, a Corporation, and to Ames, Chambers, Lowe & Richardson, attorneys of record, and to The City of Oklahoma City, a municipal corporation of the State of Oklahoma; Byron B. Shear, Municipal Counsellor of said City, its attorney of record, Greeting:

You, and each of you, are hereby cited and admonished to appear at the Supreme Court of the United States at Washington, within 30 days from the date hereof pursuant to a Writ of Error filed in the Clerk's Office of the Supreme Court of the State of Oklahoma, wherein Oklahoma Railway Company, a corporation, is Plaintiff in Error and you, and each of you are Defendants in Error, to show cause if any there be, why the judgment rendered against the said Plaintiff in Error as in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 29 day of March in the year of our Lord, 1918.

[Seal Supreme Court, State of Oklahoma.]

EDWARD DOUGLASS WHITE,
Chief Justice of the Supreme Court.
J. F. SHARP,
Chief Justice of the Supreme Court of Oklahoma.

3 Copy of the within citation received by each of us this 29 day of March A. D. 1918 and each of the Defendants in Error named in the foregoing citation now and hereby enters its

general appearance in the said cause in the Supreme Court of the United States.

SEVERNS PAVING COMPANY, A CORPORATION.
C. B. AMES,
By AMES, CHAMBERS, LOWE & RICHARDSON,
Its Attorneys.
THE CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION,
By B. D. SHEAR,
Municipal Counsellor.

[Endorsed:] In the Supreme Court of the United States of America. Oklahoma Railway Company, a corporation, plaintiff in error, vs. Severns Paving Company, a corporation, and the City of Oklahoma City, a municipal corporation, defendants in error. Citation.

4 In the Supreme Court of the United States.

In the Supreme Court of the State of Oklahoma.

OKLAHOMA RAILWAY COMPANY, a Corporation, Plaintiff in Error,

vs.

SEVERNS PAVING COMPANY, a Corporation, and THE CITY OF OKLAHOMA CITY, a Municipal Corporation, Defendants in Error.

Filed in Supreme Court of Oklahoma Mar. 29, 1918. William M. Franklin, Clerk.

Petition for Writ of Error to the Supreme Court of the State of Oklahoma.

The petition of Oklahoma Railway Company a corporation, Plaintiff in Error, respectfully shows:

1. This cause was commenced by filing in the District Court of Oklahoma County, State of Oklahoma, on May 17, 1913, by the defendant in error, Severns Paving Company, an application for a Writ of Mandamus, which application alleges and sets forth, and the Alternative Writ of Mandamus issued by a Judge of said District Court, finds:

That acting pursuant to the provisions of Art. V. Chapter 14 of Compiled Laws of Oklahoma 1909, (the same having been enacted in 1908, and being embodied in Art. XII Chap. 10 Revised Laws of Oklahoma 1910), the legislative body of the City of Oklahoma City, a municipal corporation of the State of Oklahoma, by proceedings commenced on October 11, 1910, undertook to pave Linwood Boulevard in said city and to assess the cost of such

paving to the property benefited thereby. The contract for such paving was duly let to the Severns Paving Company, Defendant in Error; the terms of said contract providing that the City of Oklahoma City would cause the levy and collection of an assessment to pay the cost of such improvement. It was claimed that
5 the Railway Company by virtue of its interests in a private right-of-way located in such street lying between the two or double drive-ways thereof, was liable to pay its proportionate share of such cost. The proceedings of the City Council, which are fully set forth in the record in said cause, show that personal assessment was attempted to be made against the Oklahoma Railway Company, plaintiff in Error, of the sum of $12,046.16, but that no assessment was attempted against the said private right-of-way of the Oklahoma Railway Company, and in the premises, it was alleged, and both in the alternative and in the peremptory writ issued by the District Court, found and adjudged that the original proceedings of the Council were, as to the Oklahoma Railway Company and any assessment against it or its property, void.

The object of the application, and the relief granted by the Mandamus which was issued, was to compel the City Commissioners of said City to make a re-assessment of the sum voidly attempted to be originally assessed against the Railway Company personally, upon the private right-of-way of the Railway Company, by some proper description: such re-assessment, it being claimed, being authorized by Sec. 644 Revised Laws 1910 providing that in event any special assessment shall be found invalid or insufficient in whole or in part, the Council may in the manner provided for levying an original assessment, proceed to cause a new assessment to be made and levied, which shall have like force and effect as an original assessment.

The Oklahoma Railway Company, though no mandatory order was asked to be issued against it was made a party to this proceeding over its objection and protest. It defended against the issuance of the Writ prayed for and issued, on three principal grounds, viz:

First. It claimed that it had a contract with the City of Oklahoma City embodied in Franchise Ordinance #281 of said City, to all the rights under which, with the consent and ratification of the city, it had succeeded and upon the faith of which contract it had built, extended and operated its street railway lines and systems in said city at an expense to exceed four million dollars. It
6 claimed that its sole and only and the limitation and extent of its duty with respect to paving or paying any portion of the cost of any pavement, was provided and expressed by and in Section IV of said franchise ordinance 281, which is fully copied in the record in said cause; and that the action sought to be commanded to be taken by the City Commissioners against it, admittedly in excess of and different from the obligations imposed by the said Section IV, impaired the obligations of the contract manifested by said Ordinance 281 and Section IV thereof, in violation of Section 10 of Art. I of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of a contract; and the Oklahoma Railway Company specifically prayed the benefit and

protection of the said provision of the Constitution of the United States.

Second. The Oklahoma Railway Company claimed furthermore, as fully appears from the record, that the territory embraced in Linwood Boulevard and lying adjacent thereto, at the times of making the contracts and dedications hereinafter described, were uninhabited, vacant, remote areas lying without the corporate limits of Oklahoma City; and that the owners of such areas desiring to market the same in lots for suburban residence purposes, in order to do which it would be necessary to procure the construction of electric railway lines and the operation and furnishing of electric railway service into and through such lands, entered into contracts with Oklahoma Railway Company to the effect that if the Oklahoma Railway Company would construct and operate such lines, then they, such owners, would, in consideration thereof, plat and dedicate the said areas and would, in the middle, and between the double drive-ways thereof, set apart and dedicate to the Railway Company a private right-of-way strip from thirty to forty feet in width in what is now known as Linwood Boulevard, upon the condition, to be expressed in the dedications, that in event such Boulevard should ever be paved, the extent and the sole liability of the Railway Company, and its only burden with respect to such paving, should be to curb along each side of such private right-of-way, to meet the paving and to pave across its tracks at street intersections; which con-
7 tracts had been duly executed and performed by the making of such plats and dedications in the manner provided by the laws of the State of Oklahoma, and the filing and recording of the same, on the part of such owners, and in the construction and operation on the part of the Railway of a line of electric railway over and upon such private rights of way; such construction and operation being at a great loss, persisting to this time; and that but for the consideration of such paving limitation, the Railway Company would not have constructed such lines. That thereafter, the city, by appropriate proceedings, annexed and included within the corporate limits of said City, such areas of territory, describing the same by referring to the recorded plat thereof, and that after the inclusion of such area in the city, the legislative body of the City, acting and claiming to act under the authority of said Article V, Chapter 14, Compiled Laws of Oklahoma, 1909, (the same being Sessions Laws of Oklahoma 1907, page 166 et seq. and also appearing as Chapter V, Art. XII Revised Laws of Oklahoma 1910), commenced the paving proceedings shown by the application for, and by the Alternative Writ of Mandamus in such proceedings throughout describing said Boulevard and the property sought to be charged with the cost of paving the same, as being shown by the said recorded plat thereof.

It was specifically urged and claimed by the Oklahoma Railway Company that the said contract and the said plats and dedications were filed in the manner provided and as authorized by the Statutes of the State of Oklahoma, and particularly Section 913 Compiled Laws of Oklahoma 1909, which provides that when a plat or map

shall have been recorded as required by law, every grant to the public or to any corporation marked or noted on the plat shall be deemed in law and equity a sufficient conveyance to vest the fee simple of all such parcels of land as are therein expressed and shall be considered to all intents and purposes, a general warranty against such donors, their heirs or representatives, to such grantee, for the uses therein named and expressed and intended, and no other use and purpose whatever, and that the land intended to be used for streets alley-ways, commons or other public purposes in any city or town or addition thereto, shall be held in the corporate name
8 thereof in trust to and for the uses and purposes so set forth, expressed or intended; and that such plat and dedications constituted a contract between the dedicators and their successors in interest in the land and lots embraced therein, and the Oklahoma Railway Company, and the public, limiting the liability of the Railway Company with respect to paving; and that when the City of Oklahoma City embraced such platted additions within its corporate limits, it did so subject to and necessarily in recognition of such contract rights of the Oklahoma Railway Company, and that since the Railway Company had already performed its obligation with respect to paving as required by such dedication contract by placing a curb to meet such paving and by paving across its tracks, at street intersections, any attempt on the part of the City to impose any greater, other or different burden with respect to such paving upon it, impaired the obligation of such contract in violation of that provision of Section X Article 1 of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of a contract; and the protection of this provision of the Constitution of the United States was specifically prayed by it.

Third. The Railway Company furthermore alleged, and offered proof, which, however, over its objection and exception, was refused admittance by the court, in support of its allegation, that the said private right-of-way had received and could receive no benefits whatever of any nature or description from such paving, but that on the contrary, the said Railway would be greatly damaged by the making of such paving. That such right-of-way property was by its very nature and location, susceptible of no benefits or increase in value for any purpose whatsoever by the making of such improvements; and that to grant the relief asked for in said action, viz: to impose a lien upon such right-of-way, for the payment of any portion of the cost of such paving, would deprive the Railway
9 Company of its property without due process of law in violation of that portion of the 14th Amendment to the Constitution of the United States which provides that no state shall pass any law depriving any person of property without due process of law; and the protection of such amendment was specifically invoked by the Oklahoma Railway Company in its behalf.

Despite the fact that for each of the three above enumerated reasons and upon each of the three above enumerated set of circumstances, the claims of the Oklahoma Railway Company to the protection of the enumerated provisions of the Constitution of the United States and

such amendment respectively were made, the District Court by its judgment and decree, peremptorily adjudged, mandamused and required the City Commissioners of Oklahoma City to assess against the private rights of way aforesaid by some proper description, the sum of $12,000 as for benefits thereto as property abutting upon the street; and upon the appeal of the said cause by the Oklahoma Railway Company to the Supreme Court, notwithstanding the fact that therein, as shown by the records in said cause and in the briefs and arguments of said cause, the Oklahoma Railway Company specifically reiterated and persisted in its claim to the protection of the said Constitution of the United States and the Amendment thereto as was done in the District Court, the Supreme Court of Oklahoma affirmed the judgment of the said District Court and denied the claims of the Oklahoma Railway Company to the protection, in such particulars, of the Constitution of the United States and such Amendment. The Supreme Court of the State of Oklahoma, in the opinion of said court in said cause, failed and omitted either in its statement of the contentions made on behalf of the Railway Company, or in the opinion of the court, to state, consider or discuss, as such, the Federal Constitutional questions specifically raised or the claims to the protection of said constitutional provisions made as above set forth. Therein however, it does not deny the validity or effectiveness of the contracts claimed by the Railway Company to exist by virtue of the franchise ordinance and the dedications; nor does it deny the power of any of the parties to either of such contracts to enter into the same and to stipulate therein as is done. Contrarily, it recognizes such ordinances and dedications, but says of them that they "have reference to street paving along the surface of which the tracks of the Railway Company are laid and the space actually occupied as a right of way over which the Railway Company has an easement only," holding in effect that since, in the opinion of the Court, the Railway Company by such dedications acquired a fee simple estate in such rights of way, the same were not within the provisions or contemplation of said said two contracts, thus necessarily adjudging that such contracts were not impaired by the subsequent paving proceedings. So the Supreme Court of Oklahoma has, by its construction of the scope and subject matter of said two contracts and by its judgment rendered pursuant to such construction, denied the claim, specifically set up and made by the Railway Company that each of such contracts covered, dealt with and limited the liability of the Railway Company under the facts of this case, and that the obligation of each would be impaired by giving effect to such paving proceedings as against it or its property.

In the premises, by affirming the decree of the District Court, the Supreme Court of Oklahoma necessarily held, decided and adjudged that the resolutions and ordinances of the said City in such paving proceedings above set out, did not impair the obligation of such contracts; and in so adjudging and decreeing the Supreme Court of the State of Oklahoma, the highest court of said State in which a decision could be had in this action this action being one wherein was drawn in question the validity of a Statute of and the authority exercised under, said State on the ground of their being repugnant to the Con-

stitution of the United States, decided upon each of the contentions made by the Oklahoma Railway Company as above more fully appears, in favor of such validity, which decision is assigned as manifest error, and denied said Oklahoma Railway Company the protection of the Constitution of the United States in each of the particulars in which same was prayed, as above shown. As to all of which
11 the Plaintiff in Error duly excepted and still excepts.

The Plaintiff in Error having, in its pleadings, briefs and arguments, in the District and Supreme Courts of Oklahoma specifically raised and claimed the protection of the Constitution of the United States and the Fourteenth Amendment thereto, it is entitled to have the Supreme Court of the United States review the judgment of said courts which effectively denies such protection, and determine the question whether such a contract exists as claimed, and whether the contracts claimed to exist did give the rights alleged by the Railway Company to have been given thereby, and whether the rights so claimed to have been contracted to it, have been impaired by such subsequent paving proceedings.

Wherefore, your petitioner prays that a Writ of Error may issue and that it be allowed to bring up for review before the Supreme Court of the United States, the said judgment of the Supreme Court of Oklahoma, in which and in the records and proceedings in said cause, manifest errors have occurred greatly to the damage of your petitioner and of each of which it complains as appears in its assignments of errors filed herewith; and which judgment was rendered, and by the action of the court taken on January 22, 1918, in overruling of its petition for rehearing upon the opinion filed by said Court in said cause on October 9th, 1917, became final and effective on said January 22, 1918; and that your petitioner may have such other and further relief in the premises as may be just; and your petitioner will ever pray, etc.

[Seal Supreme Court, State of Oklahoma.]

OKLAHOMA RAILWAY COMPANY,
HENRY E. ASP,
HENRY G. SNYDER,
By ASP, SNYDER, OWEN, AND LYBRAND,
Its Attorneys.

Allowed this 29 day of March, 1918.

J. F. SHARP,
Chief Justice of the Supreme Court
of the State of Oklahoma.

11½ [Endorsed:] No. 6778. In the Supreme Court of State of Oklahoma. Oklahoma Railway Company, a corporation, Plaintiff in Error, vs. Severns Paving Company, a corporation, et al., Defendant in Error. Petition for writ of error to the Supreme Court of the State of Oklahoma. Asp, Snyder, Owen & Lybrand, Suite 609-14 Terminal Building, Oklahoma City, Okla., Attorneys for Ptf. in Error.

12 In the Supreme Court of the United States.

In the Supreme Court of the State of Oklahoma.

Filed in Supreme Court of Oklahoma, Mar. 29, 1918. William M. Franklin, Clerk.

OKLAHOMA RAILWAY COMPANY, a Corporation, Plaintiff in Error,

vs.

SEVERNS PAVING COMPANY, a Corporation, and THE CITY OF OKLAHOMA CITY, a Municipal Corporation, Defendants in Error.

Assignment of Errors.

And now comes Oklahoma Railway Company, a corporation, plaintiff in error and makes and files its assignment of errors:

1. The Supreme Court of the State of Oklahoma erred in failing and refusing to adjudge that the franchise ordinance No. 281 of the City of Oklahoma City, which became effective February 8, 1902, constituted a contract between the Oklahoma Railway Company and said city which expressed and provided the limit of the liability of said Railway Company with respect to paving in said city, and that the subsequent attempt in the exercise of the authority of the state and the subsequent legislative enactment of a city of said state, to impose a greater or different liability than that imposed by the terms of said ordinance and contract, impaired the obligation of such contract as forbidden by Section X, Article 1 of the Constitution of the United States.

2. The Supreme Court of the State of Oklahoma erred in failing and refusing to adjudge that the attempt, made in the paving proceedings of the City of Oklahoma City, looking to the paving of the double drive-ways of Linwood Boulevard in said City, to impose any burden upon the Oklahoma Railway Company or its property, impaired the obligation of the contract between the Oklahoma

13 Railway Company and said city, in a manner forbidden by Section X, Article 1 of the Constitution of the United States.

3. The Supreme Court of the State of Oklahoma erred in adjudging that the Oklahoma Railway Company was liable to pay any part of the cost of paving Linwood Boulevard in said city under the paving proceedings taken by the Legislative body of said City, and in failing and refusing to sustain the claim of the Oklahoma Railway Company that to subject it to any liability for such paving under such proceedings would impair the obligation of its contract with the City of Oklahoma City shown by Ordinance No. 281 of said City, in violation of Section X, Article 1 of the Constitution of the United States.

4. The Supreme Court of the State of Oklahoma erred in deciding

in favor of the validity of the laws and authority of the State of Oklahoma and of said City of Oklahoma City, exercised in said paving proceedings for the paving of Linwood Boulevard in said City, and against the claim of the Railway Company that the imposition of a burden upon it or its property under said paving proceedings, in excess of the burden provided by the terms and provisions of Section 4 of Ordinance No. 281 of said City, impaired the obligation of the contract between it and said City in violation of Section 10 of Article 1 of the Constitution of the United States.

5. The Supreme Court of the State of Oklahoma erred in failing and refusing to hold and adjudge that, since the contract between the City of Oklahoma City and the Oklahoma Railway Company evidenced by Ordinance No. 281 of said City, had made provisions for, and as to what, the burden and duty of the Oklahoma Railway Company should be with respect to the subject matter of street paving, the provision so made exclusively measured the burden of said Railway Company with respect to the subject matter of street paving and by contract fixed the limit of the Oklahoma Railway Company's burden with respect to such subject matter, and that the attempt made in this cause and under said paving proceedings for the
14 pavement of Linwood Boulevard to impose another, greater and different liability, burden and obligation, with respect to such subject matter, was void as an attempt in the exercise of an authority, and made under a law, of the State of Oklahoma, by and through the Legislative body of said City of Oklahoma City, to impair the obligation of such contract.

6. The Supreme Court of the State of Oklahoma erred, in view of the fact that the City Clerk of said City had not, as provided by the provisions of Section IV of Ordinance No. 281 of said City, notified the Oklahoma Railway Company that it was required to do any paving in connection with the work of paving Linwood Boulevard in the City of Oklahoma City, in holding and adjudging that the Oklahoma Railway Company or its property was liable for or to pay any portion of the cost of paving Linwood Boulevard, and in refusing to hold and adjudge that the limit of its liability with respect to such paving was that imposed by the provisions of said Section IV Ordinance No. 281, and that in the premises, it was under no liability whatever to do anything or to pay anything, with reference to, or to pay any part of the cost of, the paving of Linwood Boulevard, and in refusing and denying its claim made to the protection of the provision of Section 10, Article 1 of the Constitution of the United States, made on the ground that the imposition of any burden upon it for such pavement would impair the obligation of the said contract in violation of Section X, Article 1 of the Constitution of the United States.

7. The Supreme Court of the State of Oklahoma erred, in view of the fact that the Oklahoma Railway Company had already done all things by it required to be done under the terms of the dedications under which it held, occupied and used its right of way in

Linwood Boulevard, in adjudging that it was, under the paving proceedings had by the legislative body of said City for the paving of Linwood Boulevard, liable for any other charge in or burden on account of such paving, as against the claim made by the Oklahoma Railway Company that to impose such lien, burden or charge would impair the obligation of its contract with said city, shown by
15 said Ordinance No. 281 of said city, in violation of the provisions of Section X Article 1, of the Constitution of the United States.

8. The Supreme Court of the State of Oklahoma erred in holding and adjudging that the plats and deeds of dedication claimed by the Oklahoma Railway Company to constitute contracts between the dedicators and their successors in interest and the public and it, the said Railway Company, had reference to street paving upon the surface along which the tracks of said Railway Company are laid and the space actually occupied as a right-of-way over which the Railway Company has an easement only; and in failing and refusing to hold and adjudge that the contract contained in the dedications of its private right of way and of the street within which the same lies, were applicable, and only applicable, to the physical condition specifically dealt with by such dedication contracts, and actually existing upon said street and with reference to such private right of way and its relation to the double drive-ways of such street, its erroneous construction of such contract and the judgment based upon the theory of such erroneous construction, constituting a denial of its claim to the protection of the obligation of such dedication contract under the provisions of Section X, Article 1 of the Constitution of the United States, against impairment by the subsequent legislative action of said State through said City and of the subsequent exercise of the authority of said State in and under such paving proceedings.

9. The Supreme Court of the State of Oklahoma erred in failing and refusing to adjudge that the several plats and dedications under which said Linwood Boulevard was dedicated as a public high-way, and under which it acquired its interest in the rights of way sought to be charged with a lien to secure the payment of a proportion of, the cost of paving such double drive-ways of said Linwood Boulevard, constitute contracts under which the obligation of the Oklahoma Railway Company, with respect to the paving of such Boulevard and double drive-ways thereof, is fully and exclusively limited and
16 fixed; and that the imposition of a lien upon its interest on such private rights of way for the payment of the sum of $12,046.16 sought to be assessed upon such private right-of-way, as adjudged in such proceedings, or the imposition of any sum whatsoever upon it, in addition to what it has already done in the performance of its obligation under such dedication, as attempted under such proceedings of the Legislative body of said City and in connection with such paving, impairs the obligation of such contract in violation of Section X Article 1 of the Constitution of the United

States, the protection of which provision was specifically claimed by the Plaintiff in Error.

10. The Supreme Court of the State of Oklahoma erred in failing and refusing to adjudge that when the area included within the suburban additions to Oklahoma City, shown by the dedications appearing in said cause, were annexed to and included within the corporate limits of such city, the sole and only rights which such city acquired in the high-ways dedicated by such dedications were acquired subject to the conditions upon which such dedications were made, among which conditions was that providing that when the street was paved, the duty of the Oklahoma Railway Company with respect to such paving was to pave the sides of such right-of-way to meet the paving and to pave across its tracks at street intersections when intersecting streets were paved, and that such condition constituted a contract, protected from impairment and which was impaired, by the paving proceedings for the paving of Linwood Boulevard in the exercise of the authority of the State of Oklahoma by said City; by reason whereof, as to such Oklahoma Railway Company the said paving proceedings are void; and that the judgment of said court was, in the premises, a denial of the claim made by the Oklahoma Railway Company to the protection of said section of the Constitution of the United States.

11. The Supreme Court of the State of Oklahoma erred in adjudging (as against the claim of the Oklahoma Railway Company to the protection of Section X Article 1 of the Constitution of the United States for its contract manifested by the said plats
17 and dedications made pursuant to the contract theretofore entered into between the owners of the suburban areas in question, as to the limit of its burden with respect to paving in event such street should be paved, the obligation of which contract imposed upon the said Railway Company had already been by it performed), that the imposition of any burden on it with respect to such paving by the paving proceedings in question under an authority exercised under the State of Oklahoma is valid.

12. The Supreme Court of the State of Oklahoma erred in upholding the ruling of the District Court of Oklahoma County refusing to permit the Oklahoma Railway Company to introduce evidence showing that the paving of Linwood Boulevard, conferred no benefit whatever upon the private right-of-way in question and that in view of the physical form, extent and location of such private right-of-way, it was susceptible of no benefit whatsoever consequent upon such paving; and the said Supreme Court of the State of Oklahoma erred in refusing to hold and adjudge that the imposition of any lien upon the said private right-of-way for and on account of such paving and the charging of such private right-of-way with a lien for any portion of the cost of such paving, would deprive the Oklahoma Railway Company of its property without due process of law in violation of that portion of the 24th Amendment to the Constitution of the United States providing that no state shall deprive any person of

property without due process of law, the protection of which amendment the Oklahoma Railway Company duly claimed.

HENRY E. ASP.
HENRY G. SNYDER,
ASP, SNYDER, OWEN AND LYBRAND,
Attorneys for Plaintiff in Error,
608-14 *Terminal Bldg., Oklahoma City, Oklahoma.*

Read on Application for Writ of Error March 29, 1918.
J. F. SHARP
Chief Justice of the Supreme Court
of the State of Oklahoma.

17½ [Endorsed:] No. 6778. In the Supreme Court of State of Oklahoma. Oklahoma Railway Company, a corporation, Plaintiff in Error, vs. Severns Paving Company et al., Defendant in Error. Assignment of Errors. Asp, Snyder, Owen & Lybrand, Suite 609-14 Terminal Building, Oklahoma City, Okla. Attorneys for Ptf. in Error.

18 In the Supreme Court of the United States.

In the Supreme Court of the State of Oklahoma.

Filed in the Supreme Court of Oklahoma, Mar. 29, 1918. William M. Franklin, Clerk.

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OKLAHOMA RAILWAY COMPANY, a Corporation, Plaintiff in Error,

vs.

SEVERNS PAVING COMPANY, a Corporation, and the CITY OF OKLAHOMA CITY, a Municipal Corporation, Defendants in Error.

Order Allowing Writ of Error.

On this 29 day of March, 1918, came on to be heard, the application of the Oklahoma Railway Company, Plaintiff in Error above named, it being represented by counsel, for Writ of Error; and it appearing to the court from the petition filed herein and the record in this cause, and from the assignment of errors herein, that the application ought to be granted and that transcript of the record and proceedings and papers upon which the judgment of the court was rendered, properly certified, should be sent to the Supreme Court of the United States, as prayed for in the petition, that such proceedings may be had as will be just in the premises.

It is therefore ordered that the Writ of Error be allowed upon the plaintiff giving bond, conditioned as the law directs, in the sum of $1000.00, and a true copy of the record, assignment of errors and all

proceedings had in the cause in the Supreme Court of the State of Oklahoma, shall be transmitted to the Supreme Court of the United States, properly certified as the law directs, that the said court may inspect the same and do what, according to law, should be done.

[Seal Supreme Court State of Oklahoma.]

J. F. SHARP,
Chief Justice of the Supreme Court of Oklahoma.

Attest:
WM. M. FRANKLIN,
Clerk.
By NEAL ORR,
Ass't.

19 Filed Mar. 29, 1918. William M. Franklin, Clerk.

In the Supreme Court of the United States of America.

OKLAHOMA RAILWAY COMPANY, a Corporation, Plaintiff in Error,

vs.

SEVERNS PAVING COMPANY, a Corporation, and THE CITY OF OKLAHOMA CITY, a Municipal Corporation, Defendants in Error.

Writ of Error.

The President of the United States to the Honorable Justices of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings as also in the rendition of the judgment, of a plea which is in said court before you, or some of you, between the parties above named, viz: Oklahoma Railway Company, a corporation, Plaintiff in Error, and the Severns Paving Company, a corporation, and the City of Oklahoma City, a municipal corporation of the State of Oklahoma, Defendants in Error, your court being the highest court of said State having jurisdiction to render judgment in the case; there was drawn in question the validity of a Statute of, and an authority exercised under, said State and the said municipal corporation, as an agency of said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity; and there being manifest error in said decision, greatly to the damage of the Oklahoma Railway Company, a corporation, Plaintiff in Error; and we being willing that if there is error, it should be duly corrected, we do therefore command you, if judgment be therein given, that under the seal of your Court you send the records and proceedings had in said cause to the Supreme Court of the United States
20 together with this Writ so that you have the same at Washington on the 27th day of April A. D. 1918, in the Supreme Court to be then and there held, that the record may be inspected by said Court and justice done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court, the 29th day of March, in the year of our Lord, 1918.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk of the United States District Court
of the State of Oklahoma.

Allowed:
J. F. SHARP,
Chief Justice of the Supreme Court
of the State of Oklahoma.

20½ [Endorsed:] In the Supreme Court of the United States of America. Oklahoma Railway Company, a corporation, Plaintiff in Error, vs. Severns Paving Company, a corporation, and the City of Oklahoma City, a municipal corporation, Defendants in Error. Writ of Error.

21 Filed Mar. 29, 1918. William M. Franklin, Clerk.

In the Supreme Court of the United States.

In the Supreme Court of the State of Oklahoma.

OKLAHOMA RAILWAY COMPANY, a Corporation, Plaintiff in Error,

vs.

SEVERNS PAVING COMPANY, a Corporation, and THE CITY OF OKLAHOMA CITY, a Municipal Corporation, Defendants in Error.

Bond.

Know all men by these presents: That the Oklahoma Railway Company, a corporation as principal, and Fidelity and Deposit Company of Maryland as surety, are held and firmly bound unto Severns Paving Company, a corporation, and the City of Oklahoma City, a municipal corporation, in the sum of One Thousand Dollars ($1,000.00) to be paid to the said obligees, their representatives and assigns, to the payment of which well and truly to be made, we bind ourselves and our successors jointly and severally to these presents.

The condition of this obligation is, that if the above mentioned Oklahoma Railway Company, Plaintiff in Error in the above entitled cause, shall prosecute a Writ of Error in the Supreme Court of the United States in said cause to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of

Oklahoma, and shall answer for all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise it shall remain in full force and effect.

OKLAHOMA RAILWAY COMPANY,
By JOHN W. SHARTEL,
Vice President.

[SEAL.] FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By T. E. BRANIFF,
Its Duly Empowered Agent.

22 STATE OF OKLAHOMA,
Oklahoma County, ss:

On this 29th day of March, before me, personally appeared John W. Shartel to me known to be the Vice-President and General Manager of the Oklahoma Railway Company, and who subscribed the name of said Oklahoma Railway Company to the within and foregoing bond and acknowledged to me that he executed the same as his free and voluntary act and deed and as the free and voluntary act and deed of such corporation for the uses and purposes therein set forth.

Witness my hand and seal of office hereto affixed at Oklahoma City in said County and State, the day and year last above written.

[SEAL.] PAULINE FUNDA,
Notary Public.

My commission expires Jan. 22, 1922.

23 STATE OF OKLAHOMA,
Oklahoma County, ss:

On this 29th day of March, A. D. 1918, before me, personally appeared T. E. Braniff, who being duly sworn deposes and says, that he is the duly authorized agent empowered by virtue of such agency to execute on behalf of his principal and to sign the name of his principal, Fidelity and Deposit Co. of Md. to the bond above appearing; and that the foregoing instrument was signed by him on behalf of said corporation by authority of its Board of Directors and that the execution of the same by his principal is the free and voluntary act and deed of said principal.

T. E. BRANIFF.

Subscribed and sworn to before me the day and year last above written.

[SEAL.] PAULINE FUNDA,
Notary Public.

My commission expires Jan. 22, 1922.

I hereby approve the foregoing bond and sureties this 29th day of March, 1918.

J. F. SHARP,
Chief Justice of the Supreme Court of the State of Oklahoma.

23½ [Endorsed:] In the Supreme Court of the United States, in the Supreme Court of the State of Oklahoma. Oklahoma Railway Company, a Corporation, Plaintiff in Error, vs. Severns Paving Company, a corporation, and the City of Oklahoma City, a municipal corporation, Defendants in Error. Bond.

24 Filed Aug. 28, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 13794.

OKLAHOMA RAILWAY COMPANY, a Corporation, Plaintiff in Error,

vs.

SEVERNS PAVING COMPANY, a Corporation, and THE CITY OF OKLAHOMA CITY, a Municipal Corporation, Defendants in Error.

Petition in Error.

The Oklahoma Railway Company, a corporation, plaintiff in error, complains of the said Severns Paving Company, a corporation, and the City of Oklahoma City, a municipal corporation, for that said Severns Paving Company, a corporation, did at the December Term of the District Court of the Thirteenth Judicial District, sitting in and for Oklahoma County, Oklahoma, and on the 28th day of February, 1914. a regular day of said December Term of said Court, recover a judgment by the consideration of said Court against the plaintiff in error, Oklahoma Railway Company, a corporation, and against the defendant in error, the City of Oklahoma City, a municipal corporation, which said defendant in error, City of Oklahoma City, a municipal corporation, is, because of its refusal to join in this appeal as a plaintiff in error, herein joined as a defendant in error, in a certain action then pending in said court wherein the said Severns Paving Company, a corporation, was plaintiff
25 and the said Oklahoma Railway Company, a corporation, and the City of Oklahoma City, a municipal corporation, were defendants.

The original case-made, duly certified and attested, and filed in said District Court, and a full, true and correct transcript and statement of all pleadings, motions, orders, journal entries, matters and proceedings had and done in said cause in said court upon which judgment was rendered therein, and the final judgment of said court in said cause, and the motion for a new trial and order overruling the same, together with the record of each and every step, proceeding, order, judgment, and decree had and taken and thing done in said cause in said court, all duly attested, is hereto attached, marked "Exhibit A" and made a part of this petition in error.

The said Oklahoma Railway Company avers that there is error in said record and proceedings in this, to wit:

(1.) The court erred in overruling the motion of the plaintiff in error for a new trial, to which action the plaintiff in error duly excepted at the time.

(2.) The court erred in overruling the objections of the said Oklahoma Railway Company to the introduction of evidence in the trial of said cause on behalf of said Severns Paving Company as against said Oklahoma Railway Company, and on behalf of the City of Oklahoma City, a municipal corporation, as against the Oklahoma Railway Company, all over the objection of, and duly excepted to by the plaintiff in error at the time.

(3.) The court erred in overruling the demurrer of the defendant Oklahoma Railway Company to the evidence in said cause offered on behalf of the said Severns Paving Company, to which the plaintiff in error duly excepted at the time.

26 (4.) Said court erred in permitting the introduction of incompetent, irrelevant and immaterial evidence on the part of the said Severns Paving Company as against the said Oklahoma Railway Company; all over the objection of, and duly excepted to by the plaintiff in error at the time.

(5.) Said court erred in refusing and ruling out certain competent and legal evidence offered by and on the part of the plaintiff in error, to which the plaintiff in error duly excepted at the time.

(6.) Said court erred in rendering a judgment in said cause against the City of Oklahoma City, commanding action upon its part and in making in such proceedings such judgment operative upon and as against the plaintiff in error, no mandatory order of any character or description having either been made or prayed to be made against or upon the plaintiff in error; all over the objection of, and duly excepted to by the plaintiff in error at the time.

(7.) Said court erred in its judgment awarding the peremptory writ of mandamus in said cause in that its said judgment involves an attempt to control the mayor and commissioners of the City of Oklahoma City in the manner of the exercise of a discretion vested in them, the same being beyond the power of any court to control; all over the objection of, and duly excepted to by the plaintiff in error at the time.

(8.) Said court erred in rendering judgment in favor of the plaintiff in the court below as against the defendants in the court below, the City of Oklahoma City, a municipal corporation, and the Oklahoma Railway Company, a corporation; to which the plaintiff in error duly excepted at the time.

27 (9.) Said court erred in failing to sustain the plea of the Oklahoma Railway Company, made and set up in its supplemental return to the alternative writ of mandamus; to which the plaintiff in error duly excepted at the time.

Wherefore, plaintiff in error prays that said judgment so rendered may be reversed, set aside and held for naught, and that a judgment may be rendered in favor of the plaintiff in error as

against the defendants in error, and that the plaintiff in error be restored to all rights that it has lost by the rendition of said judgment and for such other relief as to the court may seem just.

ASP, SNYDER, OWEN & LYBRAND,
Attorneys for Plaintiff in Error.

28-96 In the District Court of Oklahoma County, Oklahoma.

#13794.

THE SEVERNS PAVING COMPANY, a Corporation, Plaintiff,

v.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, et al., Defendants.

Case-Made.

Before the Honorable Geo. W. Clark, Judge.

Appearances:

For Plaintiff: Ames, Chambers, Lowe & Richardson, of Oklahoma City, Oklahoma.
For Defendant Oklahoma Railway Company: Asp, Snyder, Owen & Lybrand, of Oklahoma City, Oklahoma.
For Defendant City of Oklahoma City: Colonel J. W. Johnson, of Oklahoma City, Oklahoma.

Filed in District Court, Oklahoma County, Oklahoma, Jun- 13, 1914. Thos. E. Kirby, Clerk, By H. W. Garrison, Deputy.

Reporter: Guy G. Fisher.

Filed Aug. 28, 1914. W. H. L. Campbell, Clerk.

* * * * * * *

97 And thereafter, to-wit: September 22, 1913, there was made in open Court, in the District Court of Oklahoma County, State of Oklahoma, and afterwards reduced to writing and filed with the clerk of said Court and duly entered of record in the journal thereof, an order granting an alternative writ of mandamus in the foregoing entitled cause, which order, together with the endorsements thereon, is in words and figures as follows, to-wit:

98 In the District Court of Oklahoma County, State of Oklahoma.

No. 13,794.

SEVERNS PAVING COMPANY, Plaintiff,

vs.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, et al., Def'nd't.

Order.

Now on this 22nd day of September 1913, this cause comes on for hearing on application of plaintiff for writ of mandamus.

Plaintiff appears by Ames, Chambers, Lowe & Richardson, its Attorneys.

Thereupon the court being fully advised in the premises, finds that an alternative writ of mandamus should be granted herein.

It is hereby ordered that an alternative writ of mandamus be issued in the above entitled cause to the defendants, the City of Oklahoma City, Oklahoma, a municipal corporation, Whit M. Grant, Mayor, W. H. Hampton, Commissioner of Public Property, G. E. Blackwelder, Commissioner of Public Works, J. T. Highley, Commissioner of Public Safety, Elmer C. Trueblood, Commissioner of Accounting and Finance, commanding them to reassess the benefits accruing to the property of the Oklahoma Railway Company's property fronting and abutting on Linwood Boulevard from the center line of 16th Street to the East line of Grand Boulevard, which
99 benefits amount in the aggregate to $12,046.16, and that said defendants be commanded to do and perform all acts necessary to legally assess said sum against said property, or that said defendants show cause on or before twenty (20) days from this date why they have not complied with this order.

W. P. TAYLOR,
Judge.

Endorsements in the District Court, No. 13794. Severns Paving Company, Plaintiff, vs. City of Oklahoma City, et al., Defendants. Filed in District Court Oklahoma County, Oklahoma. September 22, 1913. Thos. E. Kirby, Clerk. By Nina E. Babcock, Deputy. By Mae J. Shower.

100 And on the same date, to-wit: September 22, 1913, there was issued out of the District Court of Oklahoma County, State of Oklahoma, and delivered to the sheriff of said county and state to be served on the defendants herein, an alternative writ of mandamus in the foregoing entitled cause, which alternative writ of mandamus, together with the return of the sheriff and endorsements thereon, is in words and figures as follows, to-wit:

101 In the District Court for Oklahoma County, State of Oklahoma.

No. 13,794.

THE SEVERNS PAVING COMPANY, Plaintiff.

vs.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, et al., Def'nts.

Alternative Writ of Mandamus.

* * * * * * *

Now on this 22nd day of September, 1913, this cause comes on for hearing on application of plaintiff for an alternative writ of mandamus, directed against the City of Oklahoma City, Oklahoma, a municipal corporation, Whit M. Grant, Mayor, W. H. Hampton, Commissioner of Public Property, J. T. Highley, Commissioner of Public Safety, Guy E. Blackwelder, Commissioner of Public Works, Elmer C. Trueblood, Commissioner of Accounting and Finance, and the Oklahoma Railway Co., a corporation. Plaintiff appears by Ames, Chambers Lowe & Richardson, its attorneys.

Thereupon it being made to appear to the court that the said City of Oklahoma City is a municipal corporation, that Whit M. Grant is the duly elected, qualified and acting Mayor of the City of Oklahoma City; that W. H. Hampton is the duly elected, qualified and acting Commissioner of Public Property; that J. T. Highley
102 is the duly elected, qualified and acting Commissioner of Public Safety; that Guy E. Blackwelder is the duly elected, qualified and acting Commissioner of Public Works; that Elmer C. Trueblood is the duly elected, qualified and acting Commissioner of Accounting and Finance of the City of Oklahoma City, Oklahoma; and that the Oklahoma Railway Company is a corporation duly organized, existing and doing business under the laws of the State of Oklahoma.

And it appearing further to the court that on the 11th day of October, 1910, the City of Oklahoma City, by its Mayor and Council, duly assembled at a regular session held in the City of Oklahoma City, Passed a resolution to pave Linwood Boulevard from the center line of Sixteenth Street to the East line of Grand Boulevard, in Oklahoma City, Oklahoma; and that said resolution was thereafter published in the Daily Oklahoma, the official paper of said city, for six consecutive issues, to-wit, the first being on the 14th day of October, 1910, and the last upon the 20th day of October, 1910; and,

It being made further to appear that afterwards and to-wit, on the 18th day of April, 1911, the city engineer of the City of Oklahoma City submitted plans, specifications, estimates and profiles for the paving of said street, which plans, profiles, estimates and *sepcifica-*

tions were duly approved by the council of Oklahoma City, Oklahoma, in regular session; and

103 It further appearing to the court that afterwards, on the 26th day of April, 1911, at an adjourned session of said council, same having been adjourned from its regular meeting, passed a resolution deciding *a* that no sufficient protests or objections had been filed, and reciting the determination of the City Council to proceed with the improvements in accordance with the original resolution hereinbefore referred to, and also providing the width of said streets, materials to be used, and specifications concerned curbing, and directed to the city clerk to advertise for bids as required by law; and

It appearing further to the court that thereafter and on the 27th day of April, 1911, the city clerk of the City of Oklahoma City, Oklahoma, causing a notice to paving contractors to pave said described street, to be published in the Daily Oklahoman, the official city paper, for ten consecutive issues, the first publication being on the 27th April and the last on the 8th day of May, 1911; and,

It appearing further to the court that thereafter and to-wit, on the 19th day of June, 1911, the Commissioners of the City of Oklahoma City met in regular session, at 10 o'clock A. M., of said date, and bids were opened for the paving of the street hereinbefore described; that at said meeting a contract was unanimously let to the Severns Paving Company, plaintiff herein, by the said Commissioners of the said City of Oklahoma, said Severns Paving Company being the lowest bidder therefor; and that afterwards, and to-wit, on the 24th day of June, 1911, a contract was entered into by and between the Severns Paving Company, Plaintiff herein, and the City of Oklahoma City, for the paving of Linwood Bovld. from the

104 center line of 16th Street to the East line of Grand Boulevard; and,

It further appearing to the court that contemporaneously with the execution of said contract the said Severns Paving Company filed its construction bond in accordance with the contract and conditions as required by law with the United States Fidelity and Guaranty Company, as surety, which bond was duly and regularly approved by the Commissioners of the City of Oklahoma City, Oklahoma; and,

It being made to further appear to the court that thereafter, in compliance with the terms of said contract the said Severns Paving Company entered upon the construction of said work, completed the same, and that said work was accepted by the City of Oklahoma City; and,

It further appearing to the court that afterwards, and to-wit, on the 6th day of November, 1911, the City Engineer of the City of Oklahoma City, Oklahoma, reported to the Board of Commissioners that the total cost to be apportioned and assessed for said improvements amounted to $58,673.23; and

It further appearing to the court that thereafter, and to-wit, on the 6th day of November, 1911, the Board of Commissioners of the

City of Oklahoma City met in adjourned session and appointed W. P. Knapp, S. A. Calhoun, and W. A. McKee, three disinterested freeholders residing in Oklahoma City, Oklahoma, and not owners of any property to be assessed, as a board of appraisers and *and* having been to appraise and apportion the benefits of the several lots and tracts of land to be assessed and charged with the cost of said improvement; and,

105 It further appearing to the court that afterwards and on the 20th day of November, 1911, the report of said appraisers having been filed with the City Clerk, was read and the council and Commissioners directed that notice be given of the meeting of the board as a reviewing board unfer the statute, to be held on December 4th, 1911, at 9:30 o'clock A. M.; and,

It further appearing that the City Clerk of Oklahoma City, Oklahoma, caused a notice to be published in the Oklahoma News, the official newspaper of Oklahoma City, Oklahoma, that the Board of Commissioners would meet on the 4th day of December, 1911, at 9:30 o'clock A. M., in the City of Oklahoma City, Oklahoma, in the city hall building, for the purpose of reviewing the report of the board of appraisers making the apprai-ment and apportionment of various lots, pieces and parcels, of land charged with the cost of paving and otherwise improving Linwood Boulevard from the center line of 16th St. to the East line of Grand Boulevard, in Oklahoma City, Oklahoma, and that a copy of the appraisement and apportionment as made by the said board of appraisers was attached to and published with said notice; and

It further appearing to the court that the Oklahoma Railway Company, a corporation, is and was during all the times herein mentioned, the owner of a tract of land running parallel with said improvements, fronting and abutting upon said improvements, that said board of appraisers in apportioning the cost to the

106 various lots, peices and parcels of land charged with the cost of paving, assessed the sum of $12,046.16 to the Oklahoma Railway Company's right-of-way, without describing the particular land or tract or parcel against which said apportionment was made; and,

It further appearing to the court that afterwards and to-wit, on the 4th day of December, 1911, the Board of Commissioners of the City of Oklahoma City met in special session as a reviewing board, at 9:30 A. M. in the city hall building in Oklahoma City, Oklahoma, for the purpose of hearing any complaints or objections that may be made concerning said appraisement and apportionment, and there being no objections or complaints made, the said appraisement and apportionment so made by the board of appraisers was confirmed by the Board of Commissioners of Oklahoma City, Oklahoma, acting as a reviewing board; and,

It further appearing to the court that on the 4th day of December, 1911, the Board of Commissioners of Oklahoma City, Oklahoma, met in regular session at 10 o'clock A. M. of said day, at Oklahoma City, Oklahoma, and passed an ordinance to assess the cost of said

street improvement of Street Improvement District, of Linwood Boulevard from the Center line of 16th St. to the East line of Grand Boule-ard, against the several lots and tracts of land fronting and abutting upon said Street Improvement District, which said assessing ordinance was published in the Oklahoma News, the official paper of said city, for three consecutive issue*d*, the first being on the 13th day of December, 1911, and the last upon the 15th day of Dec., 1911; and,

107 It further appearing to the Court in said assessing ordinance, the Board of Commissioners of Oklahoma City, Oklahoma, instead of assessing the apportionment to the property owned by the Oklahoma Railway Company against the property of said company fronting and abutting upon said Improvement District, wrongfully and unlawfully assess the same against the Oklahoma Railway Company generally, in the sum of $12,046.16; and,

It further appearing to the court that afterwards and to-wit, on the 16th day of January, 1912, the Board of Commissioners of Oklahoma City, Oklahoma, in regular session, passed a resolution providing for the issuance of bonds for the payment of the contract price for the improvement aforesaid; and,

It further appearing to the court that thereafter and in accordance with said resolution the City of Oklahoma City issued street improvement bonds in the aggregate, amounting to the sum of $58,693.23, which bonds bear date of December 26, 1911, one hundred ten of the said bonds being of the denomination of $500.00 each, nine of said bonds being of the denomination of $367.32 each, one bond being of the denomination of $367.35, one-tenth of the amount of said series of bonds, with interest upon the whole series to that date, being payable on the 15th day of September, 1912, and one-tenth thereof with yearly interest upon the whole amount remaining unpaid, being payable on the 15th day of September in each succe*d*ding year until all shall be paid in full, said bonds bearing interest at the rate of 6 per cent. per annum from date until

108 maturity, and 6 per cent. after maturity until paid; and,

It ap-earing further to the court that said bonds were duly executed by the Mayor and City Clerk of Oklahoma City, Oklahoma, and were delivered to the Severn Paving Company, a corporation, plaintiff herein, at their par value, in payment for said work and that plaintiff is not the owner and holder of said bonds, and that they are unpaid; and,

It further appearing to the court that it was agreed by the defendant, the City of Oklahoma City, in the Contract hereinbefore mentioned that it woul*e* cause the levy and collection of the assessment against the property liable for the same under the laws of the State of Oklahoma and would levy and collect annually in the manner provided by the laws of the State of Oklahoma a sufficient tax to pay the *g*onds so issued, with annual interest thereon as they shall become due, and the city agreed to pay out of the funds when collected from said levy said bonds with interest promptly when due, to the owners of said securities, at the office of the City Treasurer, and the city agreed to cause to be made promptly a*nn*ual collections as

provided by law, a sufficient amount of money to pay the securities so issued, together with the charges thereon; and,

It further appea-ing to the court that it is provided in said Contract, and in the laws under which said paving was made, in event any special assessment shall be found to be invalid or insuffi-
109 cient in whole or in part, for any reason whatsoever, the City Council shall at any time in the manner provided for levy and original assessment, proceed to cause a new assessment to be made and levied, which shall have like force and effect as an original assessment; and,

It further appearing to the court that under the law under which said paving and street improvement was made that the lots, pieces or parcels of land fronting and abutting upon such improvement shall be charged with the cost thereof to the center of the block, where the abutting way is on the exterior of the block, and to the exterior of the block where the improvement is made of any alley or other public way in the interior of such block, and each quarter block shall be charged with its due proportionment of the cost of so improving both the front and side streets on which said block abuts together with the areas fromed by street intersections and alley crossings as may be used by street or steam railways, which cost shall be apportioned among the lots and subdivisions of such quarter block according to the benefits to be assessed to each lot or parcel, as hereinafter provided, provided that in case of an alley extending through a block which shall not be in the center of the block, then assessment shall be made upon the property extending from the exterior of the block to such alley; and when triangular or other irregular shaped lots or tracts are to be assessed for any such improvements,
110 any part of the cost of such improvements in excess of the benefits accruing to such lots or tracts shall be borne by the city and paid from the street and bridge fund of such city; provided further, that if any portion of the property abutting upon any such improvement shall not be platted into lots and blocks the Mayor and Council shall include such property in the quarter block districts for the purpose of appraisement and assessment; and,

It further appearing to the court that the Oklahoma Railway Company, a corporation, is the owner, and was the owner during all the time herein mentioned, of certain lots, pieces, or parcels of land parallel with the said street improvement fronting and abutting upon such improvement; that the said Board of Appraisers hereinbefore mentioned wrongfully assessed the benefits to said lots, tracts, pieces, or parcels of land fronting and abutting upon said improvement to the Oklahoma Railway Company, and not against said lots, tracts or parcels of land fronting and abutting upon said improvements; that the benefits and cost of said improvement should have been assessed upon said described property as triangular or other irregular shaped lots or tracts, or as other property not platted into lots and blocks; that by reason of the failure of the board of appraisers to apportion the cost of said improvement and the benefits to be derived from the Oklahoma Railway Company for the lots, pieces or parcels of land owned by it fronting and abutting upon said improve-

ment, no assessmen-s have ever been levied by the Board of Commissioners of said Oklahoma City, Oklahoma, against the property owned by said Oklahoma Railway Company, a corporation, running parallel with said street improvement district and fronting
111 and abutting upon said street improvement district; and that the attempted apportionment is and subsequent assessment against the Oklahoma Railway Company generally for the cost of said improvement is null and void; that no taxes have ever been collected on account of the cost and benefits accruing to said property; that the plaintiff is hindered and prevented from the collection of said assessment bonds, and that a new appraisement and apportionment should be made, and that the cost of said improvement apportioned to the Oklahoma Railway Company assessed against the property of the said Oklahoma Railway Company fronting and abutting upon said street improvement.

Now, Therefore, you, the City of Oklahoma City, a municipal corporation, Whit M. Grant, Mayor, W. H. Hampton, Commissioner of Public Property, J. T. Highley, Commissioner of Public Safety, Guy E. Blackwelder, Commissioner of Public Works, Elmer C. Trueblood, Commissioner of Accounting and Finance, and the Oklahoma Railway Co. a corporation, are hereby commanded, immediately on service of this writ upon you, to cause a new and proper assessment to be made upon the property of the Oklahoma Railway Company, a corporation, fronting and abutting upon Linwood Boulevard from the center line of 16th St. to the East line of Grand Boulevard, in Oklahoma City, Oklahoma, said benefits to said property amounting in the aggregate to $12,046.16, and that you do and perform all acts necessary to a proper assessment of said benefits upon the
112 property of said defendant, the Oklahoma Railway Company, fronting and abutting upon said improvement, or that you show cause on or before *the* twenty days from the date of this writ why you have not complied with this order, and that you bring with you this order.

Dated at Oklahoma City, Oklahoma, this 22nd day of September, 1913.

W. R. TAYLOR,
Judge.

THOS. E. KIRBY,
Clerk of the District Court,
[SEAL.]
By MAE J. SHOVER,
Deputy.

Sheriff's Statement.

Received the Writ Sept. 22, 1913, and executed same in my County September 22, 1913 by delivering a true and correct copy to the City of Oklahoma City, by delivering a true and correct copy to Whit M. Grant, Mayor, and to Guy E. Blackwelder, W. H. Hampton,

J. T. Highley, Elmer C. Trueblood, in person, and to Oklahoma Railway Company, a corporation. By delivering a true copy to A. H. Classen, President of said Railroad Company, in person, September 22, 1913.

M. C. BINION,
Sheriff,
By G. E. JOHNSON,
Deputy.

Sheriff Fee:

1st person	50¢
5 additionals	1.25
6 copies	1.50
	$3.25

113 Endorsements: In the District Court. No. 13794. Severns Paving Company, a corporation, Plaintiff, vs. City of Oklahoma City, et al. a municipal corporation, Defendant. Filed in District Court, Oklahoma County, Oklahoma, Sept. 22, 1913. Thos. E. Kirby, Clerk, By Mae E. Shover, Deputy, Alternative Writ of Mandamus.

114 And thereafter, to-wit: October 20, 1913, the City of Oklahoma City, and the Board of Commissioners of said City, defendants herein, filed in the District Court of Oklahoma County, Oklahoma, with the clerk thereof, their answer in the foregoing entitled cause, which answer, together with the endorsements thereon, is in words and figures as follows, to-wit:

115 In the District Court, Thirteenth Judicial District, State of Oklahoma, Oklahoma Co.

No. 13,794.

THE SEVERNS PAVING CO., Plaintiff,

vs.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, et al., Defendants.

Separate answer of the City of Oklahoma City, Whit M. Grant, Mayor; W. H. Hampton, Commissioner of Public Property; J. T. Highley, Commissioner of Public Safety; Guy E. Blackwelder, Commissioner of Public Works, and Elmer C. Trueblood, Commissioner of Accounting and Finance, to the alternative Writ of Mandamus.

Comes no*t* the defendants, The City of Oklahoma City, Whit M. Grant, Mayor, W. H. Hampton, Commissioner of Public Property,

J. T. Highley, Commissioner of Public Safety, Guy E. Blackwelder, Commissioner of Public Works, Elmer C. Trueblood, Commissioner of Accounting and Finance, and for their separate answer to the alternative writ of mandamus herein say:

First. Defendants admit that the said The City of Oklahoma City, is and was at the times mentioned in the said alternative writ, a municipal corporation in the State of Oklahoma, and that the said Whit M. Grant, W. H. Hampton, J. T. Highley, Guy E. Blackwelder and Elmer C. Trueblood are, and were at such times, officers of said municipal corporation, as is in said Alternative writ of mandamus alleged.

116 Second. Defendants admit that the said proceedings, contract and assessment for the paving of said portion of Linwood Boulevard, as in said alternative writ of mandamus alleged, were and are as in the said alternative writ of mandamus alleged.

Third. Defendants neither affirm nor deny that the manner of assessing the said Oklahoma Railway Company, as in said alternative writ of mandamus alleged, was or is illegal and *void*, but say that said assessment was made in good faith and in the belief that it was regular and legal, and here aver that the property of said Oklahoma Railway Company was and is subject to assessment in payment of the paving of said Boulevard. Defendants pray that the court render judgement as follows; adjudging either that said assessment against the Oklahoma Railway Company as made is legal, and that the same shall be enforced, or if the court shall find said assessment to have been made in an illegal manner and void, then that the court shall render judgement, first, that the said Oklahoma Railway Company is in law required to pay its just apportion of the cost of said improvement, and, second, direct the manner in which such assessment shall be made against said Oklahoma Railway Company, and, third, requiring that said Oklahoma Railway Company be assessed as in such manner and judgement and as provided and required.

117 Fourth. Defendants say that they are ready, willing and anxious to correct such assessment if it be illegal and void, and to make such assessment in payment of the costs of such improvements as this court shall adjudge to be by law required.

J. W. JOHNSON &
BARDE V. HARDCASTLE,
Attorneys for Defendants.

Endorsements: No. 13,794. The Severns Paving Company, Plaintiff, vs. The City of Oklahoma City, a Municipal Corporation, et al., Defendants. Separate Answer of the City of Oklahoma City, et al. Filed in District Court, Oklahoma County, Oklahoma. Oct. 20, 1913. Thos. E. Kirby, Clerk, by H. W. Garrisen, Deputy.

118 And thereafter, to-wit: November 6, 1913, the Oklahoma Railway Company, one of the defendants herein, filed in the District Court of Oklahoma County, State of Oklahoma, with the

Clerk thereof, its return to Alternative Writ of Mandamus issued in the foregoing entitled cause, which return, together with the endorsements thereon, is in words and figures as follows, to-wit:

119 STATE OF OKLAHOMA,
County of Oklahoma, ss:

In the District Court.

No. 13,794.

SEVERNS PAVING COMPANY, a Corporation, Plaintiff,

vs.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, et al., Defend't.

Return to Alternative Writ of Mandamus.

The Oklahoma Railway Company, a corporation, named as defendant in the within and foregoing numbered and entitled cause for its return to the Alternative Writ of Mandamus issued and dated on September 22, 1913, in said cause says:

It denies each and every allegation, statement, finding and recital made and contained in the said Alternative Writ, save and except only those which are hereinafter specifically admitted.

It admits that the City of Oklahoma City is a municipal corporation, and that Whit M. Grant, W. H. Hampton, J. T. Highley, Guy E. Blackwelder and Elmer C. Trueblood are the Mayor and Commissioners of the said City, as is recited in the said Alternative Writ.

120 It admits that it is a corporation duly organized under the laws of the territory of Oklahoma and that it exists and is doing business under the laws of the State of Oklahoma.

In addition to its general denial and without prejudice to its general denial, or limiting the effect of the same, it specifically denies that it is the owner of the tract of land running parallel with the improvements mentioned and referred to in said Alternative Writ, fronting or abutting, or either of them, upon said improvements.

It further calls the attention of the court to the fact that one of the recitals in said Alternative Writ is that the Board of Appraisers assessed the sum of Twelve Thousand Forty-six and 16/100 ($12,046.16) Dollars to the Oklahoma Railway Company's right-of-way, without describing the particular tract of land or parcel against which said assessment was made, and

Whereas, in another portion of the said Alternative Writ it is recited that the Board of Commissioners of Oklahoma City, instead of assessing the apportionment to the property owned by the Oklahoma Railway Company, *a* against the property of said Company fronting and abutting on said improvements, wrongfully and un-

lawfully assessed the sum of Twelve Thousand Forty-six and 16/100 Dollars, and,

The attention of the court is called to the inconsistency between said recitals and demand is made upon the court to know whether the assessment attempted to be made was against the Oklahoma Railway Company's right-of-way.

121 It further especially and specifically denies without diminishing or limiting the effect of its general denial, that it was at the time mentioned in said Alternative Writ the owner of lots, tracts or parcels of said land parallel with said street improvements fronting and abutting on such improvement.

It denies that any assessment for benefits to any lots, tracts, pieces or parcels of land owned by it fronting and abutting on such improvements was ever made to the Oklahoma Railway Company.

It denies specifically that any of its property in the neighborhood or vicinity of said improvements has ever been benefitted by said improvements or susceptible of benefits therefrom.

The Oklahoma Railway Company calls attention to the fact that in the mandatory portion of the Alternative Writ of Mandamus nothing is commanded to be done by it, but it protests and objects against the order of the court upon the said City of Oklahoma City, and the Commissioners thereof being commanded to cause a new, or any assessment to be made upon any of the property of the Oklahoma Railway Company in the vicinity of the Linwood Boulevard from the center line of 16th Street to the east line of Grand Boulevard in said City, and it protests against the assumption of the Court that the benefits to its property resulting from such paving amounts to the aggregate sum of Twelve Thousand Forty-six and 16/100 Dollars, or any sum whatever, and

It protests and objects against the making of any order of the character or nature of that made by the court, upon the 22nd

122 day of September, 1913, in the above numbered and entitled cause for the reason, in addition to those reasons hereinafter set out, that neither in the petition for said Alternative Writ, nor under the facts involved, has it any property in the vicinity of the improvements mentioned and described in the said Alternative Writ and order benefitted or susceptible of benefits from such improvements, or which, under the statute, under which such assessment was pretended or attempted to be made, is the subject for assessment or for the benefits.

And for its further return to the Alternative Writ of Mandamus issued in the above numbered and entitled cause and for its answer to the petition of the plaintiff for the issuance of a Writ of Mandamus in said Cause, the Oklahoma Railway Company says:

1st. It was on the 14th day of June, 1904, duly organized and created a corporation under the laws of the territory of Oklahoma, since which time it has been and is now, by virtue of authority granted to it as a corporation under the laws of the territory and of the state of Oklahoma, engaged in operating a system of electric street railway over, along, upon and within the streets of the City

of Oklahoma City, all in the manner provided by the laws of said territory and state of Oklahoma, and by the articles of organization and incorporation of the plaintiff.

2nd. On the 28th day of January, 1902, the Metropolitan Railway Company of Oklahoma City was duly organized and created a corporation under and by virtue of the laws of the Territory
123 of Oklahoma, for the purposes and with the powers, of constructing, owning and operating a line of system of street railways over, along and upon the public streets of the City of Oklahoma City.

3rd. On the 30th day of January, 1902, acting pursuant to powers vested in them, the Mayor and Councilmen of the City of Oklahoma City duly enacted and ordained a certain ordinance, being Ordinance 281 of the City of Oklahoma City, entitled "An act authorizing the Metropolitan Railway Company of Oklahoma City, its successors and assigns, to construct and maintain an electric railway system in the streets and alleys of Oklahoma City, and regulating the construction, operation and maintenance thereof", which ordinance, having been duly published as required by law, is in word and writing and figures as follows, to-wit:

124 *Ordinances and Franchise of the Oklahoma Railway Company.*

Ordinance No. 281.

An Ordinance Authorizing the Metropolitan Railway Company of Oklahoma City, Its Successors and Assigns to Construct and Maintain an Electric Railway System in the Streets and Alleys of Oklahoma City and Regulating the Contruction, Operation and Maintenance Thereof.

Be it ordained by the mayor and councilmen of the City of Oklahoma City.

Section I.

Grant of Right to Build.

The right is hereby granted to the Metropolitan Railway Company of Oklahoma City, its successors and assigns hereinafter referred to as said railway company, to establish, construct and maintain in the streets, avenues and alleys of the City of Oklahoma City, as now existing or hereafter extended, a system of electric street railroads, consisting of either double or single tracks, with trolleys and trolley wires, and all necessary and convenient fixtures and appurtenances needful in the construction and operation of such railroads and shall have the right to construct for the purpose of transmitting the power for the propulsion of its cars, overhead trolley systems sus-
125 pended on posts placed along the curb lines or in the center of such street or streets where necessary. Provided, however,

that where any street in any addition in the City of Oklahoma City may have been dedicated subject to any restriction or prohibition against the maintenance or operation of street railway lines thereon, this grant shall be subject to any such restriction or prohibition contained in any dedication of any such street or part of street.

Provided, further, that this grant shall be subject to all the restrictions and regulations hereinafter contained.

Section II.

Construction.

All wires suspended from trolley posts shall be not less than 18 feet above the surface of the street and all the works and improvements of the said railway company shall be constructed under the supervision of the City Engineer and the Public Improvement committee so as to afford the least interference, both in construction and maintenance, with the free and unrestricted use of the streets by the public, consistent with the construction and maintenance of said railway; and the said engineer shall furnish all necessary grade stakes, maps, profiles and other information necessary to enable said railway company to conform to established grade lines and other established profiles for streets, street crossings or gutters.

Provided, however, that the said railway company shall pay the said city for all services it may demand of the said City Engineer in connection with the construction of said railway.

Section III.

Tracks and Equipment.

In the construction of said railway system where grades are established, the surface of the said railway company's tracks shall conform to established grades. Where grades are established, but streets not reduced thereto, or where no grades are established, the tracks shall be laid to conform to the existing surface. Where tracks are laid where there is no established grade or where the street is not reduced to an established grade, upon the establishment of such grade by the City of Oklahoma City and the bringing of the street to such grade said railway company shall raise or lower its tracks to conform thereto at its own expense.

The entire system of tracks, trolleys, rails and equipment shall be modern, first-class and suitable in design for the service for which it is intended.

Upon the four miles of track to be constructed within twelve months, and for which the company shall file a map within thirty days of its route, with the City Clerk, there shall be maintained in continuous service a schedule for the passage of cars in each direction with not less frequency than every twenty minutes during not less than twelve hours each day, and not less frequency than every

thirty minutes during at least four additional hours, unless prevented by temporary accidents, strikes or the act of God.

Section IV.

Paving.

Wherever the line of the railway company's tracks traverse
126 any street upon which the pavement is constructed, it shall be the duty of said company after laying its tracks, to restore such pavement wherever injured or destroyed, taken up or removed, to its previous condition. And wherever the said City of Oklahoma City shall hereafter pave or re-pave any street upon which said line of street railway is constructed, it shall be the duty of said railway company to construct or pay the cost of construction of a total width in area along the street so occupied, of six and two-thirds (6 2-3) feet for each track occupying such street according to specification adopted by said council. And to maintain such pavement in good condition during the time such tracks may remain in such streets, except when the duty of the maintenance of said pavement may rest upon any contractor constructing such pavement.

Provided, that the said railway company may construct along its tracks detachable curbs of blocks or brick of sufficient width to enable the said company to take up or repair its tracks or rails without disturbing any pavement of a cement or asphaltic character used on any such street.

Upon the final determination of the city council to pave any such street, it shall cause the City Clerk to give a written notice of such determination to said railway company, and the railway company shall, if it desires to construct said pavement itself, so notify the City Clerk in writing before the contract for the construction of such pavement is awarded; and it shall thereupon be the duty of said railway company, upon making such election, to execute its part of such paving in conjunction with the progress of the same work under the direction of the city. In the event of said railway company failing to give such notice, or failing to proceed with the work, if such notice is given, the said work may be executed by the city and charged to the said railway company by an assessment of benefits as provided by the law for the assessments for benefits "to individual abutters" and the measure of the liability of said railway company shall be the cost of construction by contract of that portion of the pavement hereby made the duty of the said railway company to construct. And the said assessments shall be levied and collected in the same manner as the assessments of individuals and all of the property of the said railway company shall be liable therefor. The said railway company hereby by the acceptance of this ordinance assents to the collection of such assessments in the manner herein provided for.

Section V.

Time and Manner of Construction.

The said railway company shall within ten days after the passage of this ordinance deposit in the office of the City Clerk a copy of a resolution of its Board of Directors, duly attested, accepting the terms and conditions of this franchise, shall upon its passage and approval deposit a sufficient sum to pay for its publication and with its resolution of acceptance shall deposit with the City Clerk of said city, a certified check for fifteen hundred dollars ($1,500) as a guaranty that it will proceed with the construction of the system of street railway lines herein provided for and upon the following conditions:

1st. That it will commence the construction of its lines of railway within ninety (90) days from the making of such deposit.

2nd. That it will prosecute the construction of such line
127 diligently, and have at least four miles of line constructed and in operation within nine (9) months thereafter.

In the default of either of these conditions, the said sum of money shall become the property of Oklahoma City as its liquidated damages.

Provided, however, that if any delay should be occasioned on account of manufacturers being unable to fill orders placed for materials, rails, or equipment within the times herein limited, and the said railway company shall submit proofs by affidavits of its officers, or others, of diligent efforts to buy rails or other material for the construction of such line, and their inability to procure delivery thereof on account of delay of the manufacturer, or manufacturers, the period of said delay not exceeding three months, shall be deducted in computing time when said construction shall commence or when said line shall be completed.

Section VI.

Regulation and Control of Operation by Oklahoma City.

The mayor and councilmen of said city shall not be deemed by the granting of the privileges contained in this ordinance to have waived or abandoned the right to make any and all needful police regulations with reference to the operation or maintenance of said street car system, and shall at all times have the power to pass ordinances regulating the use of headlights, gongs and fenders and all other needful rules and regulations for the protection of the inhabitants of said city, in connection with the operation of said railway. And whenever the cost of propulsion of electric cars by means of storage batteries, or other new inventions, is reduced to the cost of moving such cars by means of overhead trolley, the mayor and councilmen may require the substitution of such improved method.

The cars of said railway shall at all times be entitled to the track and the drivers of all vehicles on the tracks or by the side thereof,

shall turn all vehicles out on the approach of such cars so as to leave the tracks unobstructed for the passage of such cars.

Provided, that steam fire engine or other apparatus of the City of Oklahoma City shall at all times when answering the alarm of fire, have the right of way, where possible, over, across and along the tracks of said street railway, and the cars of such railway company shall be stopped after the sounding of a fire alarm and upon the approach of fire engines, hose-carts or other fire apparatus, which stoppage shall be made when such apparatus is within a distance of three hundred (300) feet of such cars, and shall remain standing until the same shall have passed.

All cars shall be equipped with gongs to be used for a warning upon the approach of street crossings, and shall be provided with headlights when run after night. They shall not be operated at an average speed of more than ten miles an hour in the business portion of the city nor more than fifteen (15) miles per hour in the residence portion thereof.

Section VII.

Charges for Transportation.

The charges for transporting passengers to be exacted by
128 said railway company shall not exceed the sum of five cents for one continuous passage over the said company's lines from points within the city limits to any other point in such city; such limit in price shall not prevent the exaction of an additional fare for return journeys nor shall transfer slips be good for stop-over privileges.

Tickets for the use of school children shall be furnished good for on- continuous passage, in quantities of not less than twenty rides at the rate of two and one-half (2½) cents each, under any reasonable regulations which the company may impose to prevent the abuse of such privilege or the use of such tickets by others than children under fifteen years of age in actual attendance on the public schools of said city.

United States mail carriers, policemen, and members of the fire department, while in the discharge of their duties shall be carried free. Children under five years of age when accompanied by parents or guardians shall be carried free.

Section VIII.

Mortgages and Bonds.

The said railway company shall be permitted to borrow money for the purpose of constructing its lines of railway, to issue its bonds therefor running for a period of not exceeding fifty (50) years, with interest at the rate of 6 per cent per annum; and execute mortgages or deeds of trust to secure the same upon all of its property, franchise

and rights of whatsoever kind and character and upon the execution of any such bonds, mortgages or deeds of trust shall cause an abstract thereof to be filed in the office of the City Clerk.

Section IX.

Purchase.

At the expiration of thirty years from the granting of this franchise, the City of Oklahoma City either under any power which it may now have or under any power which may be hereafter conferred upon it shall have the right to purchase of the said railway company, its successors and assigns, the entire plant of the said railway company within the incorporated limits of said city, including all of its tracks, trolley and cars used within the incorporated limits of said city, and all of its property rights both tangible and intangible within the incorporated limits of said city and all of its franchises, rights whatsoever except rights, tracks, circuits, power houses, power plants and generating machinery used in suburban lines lying without said city limits or lines extending from said city to other points, ordinarily designated as inter-urban lines.

Provided, that if the said city shall desire to purchase the said plant as aforesaid, it shall cause a written notice to be served on the said railway company for at least three months before the expiration of the said period of thirty years, of its intention to so purchase. During the ninety days preceding the expiration of the said thirty years, the said railway company, its successors or assigns and the said city may agree upon a valuation and terms for the purpose of making such purchase, and if the value of said railway plant cannot be agreed upon, either party may demand an arbitration of such values. Each party shall select one arbitrator, and the two so selected shall select an umpire and, after giving both parties an opportunity to be heard, shall make an award which shall be final
129 and binding on both parties and shall be a rule of any court of general jurisdiction authorized to take cognizance of the subject and enforce it as such. The arbitrators shall be wholly impartial and disinterested, shall be practically conversant with the special subject, and shall before proceeding with their duties take an oath to fairly and impartially appraise the property, and in appraising such property, the cost of the same in connection with its physical condition and its productive capacity, shall be equal factors in arriving at the true value of such property.

In the event that said system shall embrace lines outside of the city limits, or extending from Oklahoma City to other towns, no purchase of said plant shall deprive the said railway company, its successors or assigns, of access to the interior of the city for convenient delivery of passengers, baggage, parcels, freight or United States mails therein, and the use of any portion of the tracks, so purchased by the city for such purpose; and if the generation for power for traffic inside and outside of the city is from one common plant,

and the parties are unable to agree upon a division of the property or generating machinery, the arbitrators herein provided for shall have authority to make any rule with reference thereto which may be equitable, and the said arbitrators also in case of disagreement shall have the right to determine the route to be pursued by the railway company in its ingress into and egress from the city with its suburban traffic, the particular tracks which it shall use and the rental to be paid therefor for the use of tracks, trolleys or power to be furnished by the city for the propulsion of such suburban and inter-urban cars over the lines purchased by the city and to finally settle and determine and adjust any and all matters resulting from a separation of that part of the system of lines proposed to be built by the grantee lying inside of the limits of Oklahoma City from that part of such system lying without.

The said City of Oklahoma City shall have six months after the final valuation and adjustment of the value of the plant to be purchased and of the terms and conditions thereof, to complete said purchase and to pay said street car company therefor. The said company, however, shall be entitled to all the proceeds resulting from traffic until the purchase money is paid and upon the payment or tender of said purchase money as shown by any final valuation, the said city shall be entitled to all necessary deeds and transfers to vest perfect title in the city to all property so purchased.

Provided, further, that the obligations of the mortgages, deeds of trust or bonds of the said railway company (executed for the purpose of constructing said lines or any part thereof within the city limits of Oklahoma City) shall not be impaired by any such purchase further than the City of Oklahoma City at the termination of any such period may, if it so desires, if the maturity of said bonds run beyond such period call such bonds for payment, and the same shall be subject to the right of the City of Oklahoma City to redeem such bonds at any period wherein it is authorized to purchase said plant, and the amount so paid shall be deducted from the amount of purchase money to be paid to said railway company, its successors or assigns; or, the said city may at its option, purchase said railway system subject to the bonded indebtedness thereon and continue such
130 bonds in force and deduct the amount thereof with any accumulated interest at the date of such purchase from the price to be paid.

The bonds of said railway company shall be separately issued for lines within the city limits and without the city limits, and bonds issued upon lines which are without the city limits at the time of the construction thereof and which are afterwards taken into the city limits, shall in no case be impaired or affected by such purchase of said railway company, but if such lines should be included in any purchase made by the city such bonds shall be unaffected thereby and the amount of the principal or interest to be paid thereon by the city as a part of the purchase as between the railway company and the city, shall be a matter for agreement between them or settlement by said arbitrators, but shall not prejudice the rights of the holders

of such bonds to enforce their security against all of the property originally included therein.

The like option with all of its incidents herein provided for at the expiration of thirty years after the granting of this franchise, together with the methods of ascertaining the value, and all other particulars specified with reference to such purchase, may be exercised by the said city at the expiration of every fifteen years after said period of thirty years.

Section X.

The said railway company, its successors or assigns, shall save the city of Oklahoma City harmless from all costs, damages and for the payment of which the said City of Oklahoma City may become liable to any person or corporation by reason of any negligence of the said railway company either in the construction, maintenance or operation of said street railway system or any part thereof by reason of any failure upon the part of the said railway company to comply with the provisions and regulations of this ordinance.

Section XI.

All rolling stock, repair shops, power houses and business offices of the said railway company, its successors or assigns used or maintained for the purpose of operating said system of street car lines in Oklahoma City shall be kept and maintained within the corporate limits of said city.

Section XII.

Participation in Profits.

After ten years if the city shall have attained a population of 25,000 said company shall pay to the said city one per cent of its gross income from operation within the city limits and an additional one per cent for each 15,000 inhabitants over and above the said 25,000.

Provided, that the total participation of said city in the income of said railway company from operation as aforesaid shall at no time exceed three per centum thereof, nor shall said participation at any time be permitted to prevent a return to said company of its operating expenses, its fixed charges, and at least six per centum annual income upon its capital stock.

Section XIII.

The rights granted in this ordinance shall be subject to the right of the city to grant similar rights to others on any other street or streets than those occupied by the grantee herein with its track or tracks and also on such streets as the said grantee

herein may have manifested its intention of occupying by filing a map of its route for a line or lines along such streets with the City Clerk of said city; which map shall protect the grantee herein in the prior right to occupy such street or streets for a period of twelve (12) months from the filing of such map.

Provided, the said railway company shall commence said construction within six months from the filing of said map; but if the said company should fail to commence or fail to construct its line or lines according to such map for the period of twelve months from the filing thereof to commence the construction thereof within three months the city may authorize any other person or company to build along any portion of said route not occupied by the lines of railway of the grantee herein.

Provided, the said company shall build the four miles of track hereinbefore provided for within the time limited in section five, and that for the said original four miles the said company shall not be protected in its prior right for a longer period than prescribed in section five.

Section XIV.

All ordinances heretofore passed authorizing any person, company or corporation to construct street car lines in the City of Oklahoma City, and all other ordinances or parts of ordinances in conflict herewith are hereby repealed.

Section XV.

This ordinance shall take effect and be in force from and after its passage, approval and publication.

Passed by the city council on the 30th day of January, 1902.
Approved on this 30th day of January, 1902.

[SEAL.] ED. L. DUNN,
President of Council and Acting Mayor.

T. A. BLAISE,
City Clerk.

Approved on this 8th day of February, 1902, by
C. G. JONES,
Mayor.

TERRITORY OF OKLAHOMA,
County of Oklahoma, ss:

I hereby certify the foregoing to be a true and correct copy of the original ordinance of the Metropolitan Railway Company of Oklahoma City, on file in my office.

Dated this 13 day of October, 1903.

[SEAL.] T. A. BLAISE,
City Clerk.

TERRITORY OF OKLAHOMA,
City of Oklahoma City, ss:

I, the undersigned clerk of the City of Oklahoma City, do hereby certify that Ordinance No. 281 of the City of Oklahoma City was published in The Daily Oklahoman, an official paper of the City of Oklahoma City and thereby became effective on the 11th day of February, A. D. 1902.

I do further certify that the certified check for $1,500 deposited by the Metropolitan Railway Company in accordance with the terms of said ordinance was returned to the Metropolitan Railway Company in accordance with the order of the city council entered on the journal of said city council on the 25th day of May, 1903, on or about the 26th day of May, 1903.

Dated this 13th day of October, A. D. 1903.

[SEAL.]

T. A. BLAISE,
City Clerk.

132 4th. The Metropolitan Railway Company of Oklahoma City by corporate action duly had and taken, duly accepted the terms and provisions, and all of them of said Ordinance and did forthwith, and within the times conditioned in said ordinance, comply with each and every of the terms and conditions therein contained, and did from time to time until the 14th day of June, 1904, construct various lines of street railway upon the streets of the City of Oklahoma City and did until said 14th day of June, 1904, continuously and uninterruptedly operate such of its said street railway system as had been from time to time constructed as aforesaid, such operation and construction having been in compliance with all the terms and provisions of said Ordinance 281, and upon the faith of the said ordinance and the franchise thereby granted, and the contract therein contained; and that the said Metropolitan Railway Company of Oklahoma City, Oklahoma, had prior to the said 14th day of June, 1904, expended more than $400,000.00 in the construction, completion and equipment of the said system of street railways upon the streets of said city in full reliance upon the franchise and contract granted and manifested by the said Ordinance No. 281.

5th. On the 14th day of October, 1903, the said Mayor and Councilmen of the City of Oklahoma City, passed and ordained an ordinance amendatory in the provisions of Section 8, of said Ordinance 281, which said amendatory Ordinance having been duly published as required by law, is in words and figures following, to-wit:

133 (First Published October 15, 1903.)

Ordinance No. 377.

An Ordinance Amending Section VIII of Ordinance No. 281 of the City of Oklahoma City Entitled "An Ordinance Authorizing the Metropolitan Railway Company of Oklahoma City, Its Successors and Assigns, to Construct and Maintain an Electric Railway System in the Streets and Alleys of Oklahoma City and Regulating the Construction, Operation and Maintenance Thereof.

Be it ordained by the Mayor and Councilmen of the City of Oklahoma City.

SECTION 1. That Section VIII of Ordinance No. 281 of the City of Oklahoma City, published on the 11th day of February 1902, entitled, "An Ordinance authorizing the Metropolitan Railway Company of Oklahoma City, its successors and assigns to construct and maintain an electric railway system in the streets and alleys of Oklahoma City and regulating the contruction, operation and maintenance thereof, "be, and the same is hereby amended by striking out the word "at" following the word "interest", and inserting in lieu of said word the words "not exceeding", so that said section as amended shall read as follows:

SECTION VIII. Mortgages and Bonds.—The said railway company shall re permitted to borrow money for the purpose of constructing its lines of railway and to issue its bonds therefor running for a period of not exceeding fifty (50) years, with interest not exceeding the rate of six (6) per cent per annum, and execute mortgages or deeds of trust to secure the same upon all its property, franchises and rights of whatsoever kind and character, and upon the execution of any such bonds, mortgages or deeds of trust shall cause an abstract thereof to be filed in the office of the City
134 Clerk."

SECTION 2. This ordinance shall take effect and be in force from and after its passage, approval and publication and its written acceptance by the same Metropolitan Railway Company of Oklahoma City placed on file with the City Clerk over the signature of its President and Secretary and shall be deemed to ratify and confirm any mortgage indebtedness heretofore issued by said Company at a less rate of interest than six per centum per annum.

Passed this 14th day of October, 1903.

Approved this 14th day of October, 1903.

LEE VAN WINKLE,
Mayor.

Attest:

[SEAL.] T. A. BLAISE,
City Clerk.

6th. On the 13th day of June, 1904, the said Mayor and Councilmen of the City of Oklahoma City, Passed an ordinance amending Section 9, of the said Ordinance 281, which said amendatory Ordinance of June 13th, 1904, was duly approved by the Mayor of Oklahoma City, on the 14th day of June, 1904, and as so enacted, was duly published as required by law, and is in words and figures following, to-wit:

135 Published June 16th, 1904.

Ordinance No. 423.

An Ordinance Amending Section IX of Ordinance No. 281 of the City of Oklahoma City, Entitled "An Ordinance Authorizing the Metropolitan Railway Company of Oklahoma, Its Successors and Assigns to Construct and Maintain an Electric Railway System in the Streets and Alleys of Oklahoma City and Regulate the Construction, Operation and Maintenance Thereof."

Be it Ordained by the Mayor and Councilmen of Oklahoma City:

Section 1.

Section IX of Ordinance No. 281, of the City of Oklahoma City, entitled "An Ordinance authorizing the Metropolitan Railway Company of Oklahoma City, its successors and assigns to construct and maintain an electric railway system in the streets and alleys of Oklahoma City, and regulating the construction, operation and maintenance thereof," be, and the same is hereby amended to read as follows:

Section IX.

Purchase.

At the expiration of thirty years from the granting of this Franchise the City of Oklahoma City, either under any power which it may now have or under any power which may hereafter be conferred upon it, shall have the right to purchase of said railway company, its successors and assigns, the entire plant of said railway company within the incorporated limits of said city, including all of its tracks, trolley, and cars used within the incorporated limits of said city, and all of its property rights, both tangible and intangible, within the incorporated limits of said city and all of its franchises and rights whatsoever, except rights, tracks, circuits, power houses, power plants, and generating machinery used in suburban line lying without said city limits or lines extending from said city to other points, ordinarily designated as inter-urban lines.

Provided, that, if the said city shall desire to purchase the said plant as aforesaid, it shall cause a written notice to be served
136 on the said railway company, for at least three months before the expiration of the said period of thirty years of its inten-

tion to so purchase. During the ninety days preceding the expiration of the said thirty years, the said railway company, its successors or assigns and the said city may agree upon a valuation and terms for the purpose of making such purchase, and if the value of said railway plant cannot be agreed upon, either party may demand an arbitration of such values. Each party shall select one arbitrator and the two so selected shall select and umpire, and after giving both parties an opportunity to be heard, shall make an award which shall be final and binding on both parties and shall be a rule of any court of general jurisdiction, authorized to take cognizance of the subject and enforce it as such. The arbitrators shall be wholly impartial and disinterested, shall be practically conversant with the special subjects, and shall, before proceeding with their duties, take an oath to fairly and impartially appraise the property, and in appraising such property, the cost of the same, in connection with its physical condition and its productive capacity, shall be equal factors in arriving at the true value of such property.

In the event that said system shall embrace lines outside of the city limits, or extending from Oklahoma City to other towns, no purchase of said plant shall deprive the said railway company, its successors or assigns, of access to the interior of the city for convenient delivery of passengers, baggage, parcels, or United States mails therein, and the use of any portion of the tracks so purchased by the city for such purpose; and if the generation for power for traffic inside and outside of the city is from one common plant, and the parties are unable to agree upon a division of the property or generating machinery, the arbitrators herein provided for shall have authority to make any ruling with reference thereto which may be equitable, and the said arbitrators also, in case of disagreement, shall have the right to determine the route to be pursued by the railway company in its ingress into and egress from the city with its suburban traffic, and the particular tracks which it shall use and the rental to be paid therefor for the uses of tracks, trolleys, or power to be furnished by the city for the propulsion of such suburban and inter-urban cars over the lines purchased by the city and to finally settle and determine and adjust any and all matters resulting from a separation of that part of the system of lines proposed to be built by the grantee lying inside of the limits of Oklahoma City from that part of such system lying without.

The said City of Oklahoma City shall have six months after the final valuation and adjustment of the value of the plants to be purchased and of the terms and conditions thereof, to complete the said purchase and to pay said street car company therefor. The said company, however, shall be entitled to all the proceeds resulting from traffic until the purchase money is paid and upon the payment or tender of said purchase money as shown by any final valuation, the said city shall be entitled to all necessary deeds and transfers to vest perfect title in the city to all property so purchased.

Provided, further, that the obligations of the mortgages, deeds of trust, or bonds of the said railway company or its successors or as-

137 signs shall not be impaired by any such purchase further than the City of Oklahoma City at the termination of any such period may, if it so desires, if the majority of said bonds run beyond such period, call such bonds for payment and the same shall be subject to the right of the City of Oklahoma City to redeem such bonds at any period wherein it is authorized to purchase the said plant, and the amount so paid shall be deducted from the amount of purchase money to be paid to said railway company, its successors or assigns, or, the said city may at its option purchase the said railway system subject to the bonded indebtedness thereon and continue such bonds in force and deduct the amount thereof, with any accumulated interest at the date of said purchase from the price to be paid. If, at the time of such purchase, any mortgage or deed of trust upon the property of the said railway company, its successors or assigns, shall include property which the city shall have the right to purchase and property not within the existing limits of the city and which is not purchased by said city, the distribution of the assumption of payments to be made as between the said railway company or its successors and the said city on account of such mortgage or deed of trust shall be a matter for agreement between them or settlement by the said arbitrators but shall not prejudice the rights of the holders of such bonds to enforce their security against the property originally included therein. The said arbitrators, however, shall have the power if in their judgment it is necessary, for the protection of the city, to require the said company or its successors to indemnify the city against probable loss on account of any deficiency in that portion of said property not purchased in not satisfying its due proportion of said indebtedness.

The like option, with all of its incidents herein provided for at the expiration of thirty years after the granting of this franchise, together with the methods of ascertaining the value, and all other particulars specified with reference to such purchase, may be exercised by the said city at the expiration of every fifteen years after said period for thirty years.

Section II.

This ordinance shall be in force and take effect from and after its passage, approval and publication.

Passed on the 13th day of June, 1904.

(Signed) T. A. BLAISE,
City Clerk.

Approved on the 14th day of June, 1904.

(Signed) LEE VAN WINKLE,
Mayor.

The above and foregoing ordinance No. 423 was passed by the council the 13th day of June, 1904, approved by the Mayor on the

14th day of June, 1904, published in the Daily Oklahoman on the 16th day of June, 1904. Council proceedings No. 8, page 470, shows roll call vote on the final passage.

(Signed) T. A. BLAISE,
City Clerk.

138 7th. All of said ordinance- of the said City of Oklahoma City above set out, were duly passed, approved and published, as required by law, and becase and were and have been from the dates above set out, the duly enacted and legal ordinances of the city of Oklahoma City.

Pursuant to the power by the laws of the Territory of Oklahoma vested in the Metropolitan Railway Co. to purchase and take the same, and by virtue of the provisions of Ordinance 281 of the City of Oklahoma City, by the terms of which ordinance the same were made assignable, the said Metropolitan Railway Company did, on the 15th day of June, 1904, for a valuable consideration, by deed duly delivered and filed for record as provided by law, convey to the Oklahoma Railway Company all of the property and good will and all of the franchises and rights of whatsoever nature under said ordinance 281 and the ordinances supplemental thereto and amendatory thereof; and that by virtue of such conveyance the Oklahoma Railway Company did take and is now possessed of each and every of the rights, franchises and privileges granted and contracted by said Ordinance 281, and the said ordinances supplemental thereto and amendatory thereof. In order to avoid prolixity the said deed is omitted therefrom, but the Oklahoma Railway Company offers to produce the same for examination and inspection.

139 8th. Upon the execution and delivery of said deed by the Metropolitan Railway Company to the Oklahoma Railway Company it then and there and thereby became the owner of and vested with all the rights, privileges and franchises of said Metropolitan Railway Company and of all of the property thereof so conveyed and has since held and possessed such property and exercised all the rights and privileges granted by said Ordinance 281 and the ordinances supplemental thereto and amendatory thereof, and has continued in the exercise of such rights to extend the lines and systems of street railway in said City of Oklahoma City and has now invested in said system of street railway and in reliance upon the rights, privileges and franchises of said Ordinance 281, and Ordinances supplemental thereto and amendatory thereof, as expended in such extension and in betterments and improvements and additional sum of approximately Four Million Dollars.

9th. Thereafter on the 27th day of June, 1904, the Mayor and Councilmen of the City of Oklahoma City duly ordained by Ordinance duly passed and published in accordance with the law, that the transfer, conveyance and assignment of the property, property rights and franchises of the Metropolitan Railway Company of Oklahoma City, to the Oklahoma Railway Company be ratified, confirmed and approved, and that said defendant, Oklahoma City, as-

sented to said transfer, which said Ordinance is Ordinance No. 427 of the City of Oklahoma City, and is in words and figures and as follows, to-wit:

140 *"Ordinance No. 427."*

An ordinance ratifying and confirming the transfer of the property, property rights, and franchises of the Metropolitan Railway Company of Oklahoma City to the Oklahoma City Railway Company.

Be it ordained by the Mayor and Councilmen of the City of Oklahoma City, Oklahoma:

Section 1. That the transfer, conveyance and assignment of the property, property rights, and franchises of the Metropolitan Railway Company of Oklahoma City to Oklahoma Railway Company be, and the same is hereby ratified, confirmed and approved, and that the city of Oklahoma City hereby assents to said transfer.

Section 2. This ordinance shall take effect and be in force from and after its passage, approval and publication.

Passed this 27th day of June, 1904.
Approved this 6th day of July, 1904.

LEE VAN WINKLE,
Mayor.

T. A. BLAISE,
City Clerk.

141 10th. That the plaintiff by virtue of the said deed and by virtue of the said ordinances 281 and 427, became vested with and entitled to exercise all of the rights, privileges and powers enumerated and conferred by the said ordinance 281, and said ordinances supplemental thereto and amendatory thereof, the terms of which in the premises, became and are now, mutually obligatory and binding upon the said City of Oklahoma City, and the Plaintiff.

11th. By the terms of Section Four (4) of the said ordinance 281, it is provided among other things that "Whenever the said City of Oklahoma City shall hereafter pave or repave any street upon which said line of street railway is constructed, it shall be the duty of the said railway company to construct or pay the cost of construction of a total width in area along the street so occupied of Six and two-thirds (6-2/3) feet for each tract occupying such street according to specifications adopted of said Council"; and, by the further provisions of Section 4, it is provided that, "Upon the final determination of the City Council to pave any such street, it shall cause the City Clerk to give written notice of such determination to said railway company, and the railway company shall, if it desires to construct said pavement itself, so notify the City Clerk in writing before the contract for the construction of such pavement is awarded; and it shall thereupon be the duty of the said rail-
142 way company, upon making such election, to execute its part of such paving in conjunction with the progress of the same

work under the direction of the City. In the event of said railway company failing to give such notice or failing to proceed with the work, if such notice is given, the said work may be executed by the City and charged to the said railway company by assessment of benefits as provided by the law for assessment for benefits, "To individual abbutters," and the measure of the liability of said railway company shall be the cost of construction by contract of that portion of the pavement hereby made the duty of the said railway company to construct. And the said assessments shall be levied and collected in the manner as the assessments of individuals and all of the property of the said railway company shall be liable therefor. The said Railway company hereby by the acceptance of this ordinance assents to the collection of such assessments in the manner herein provided for."

12th. By an act, entitled "An act to provide for the improvement of streets and other public places within cityies of the first class, by grading, paving, macademizing, curbing, guttering and draining the same, and declaring an emergency", which act was duly passed by the First Legislature of the State of Oklahoma, of 1907-8, the same having been amended by the Second Session of the First Legislature of Oklahoma, as to the third section thereof, by an act entitled "An Act entitled to provide for the improvement of streets and other public places within cities of the first class, be grading, paving, macademizing, curbing, guttering and draining same;
143 and declaring emergency, approved April 17, 1908" (which as amended is and appeared as Article V of Chapter 14, of Compiled Laws of Oklahoma, 1909), it is provided that in cities of the first class of the State of Oklahoma to which class the City of Oklahoma City belongs, all street railway companies operating in such cities shall be required to pave the portion of their tracks situated in the streets of such city and two feet on each side thereof, as the remainder of such streets are paved or of such other material as the City may require, and that when there are two or more tracks of any street railway company upon one street then such company shall be required to pave, as the City may require, also the space between said tracks; that by further provisions of said Legislative Enactment, it is provided that if the owners of such street railway shall fail or refuse to comply with the order of the City may direct to make such improvements by paving such streets as the City may direct, such work may be done by the City and the cost and expense thereof shall be charged against such street railway company and may be collected in the District Court in the County in which such improvements have been made by an action of law in the name of the City against such street railway company, and is provided that in addition to said remedy, the City shall be entitled to a lien upon the property of such street railway company and such lien shall exist for the full amount of the cost and expense of constructing and laying such pavement against the property of such street railway company
adjacent or contiguous to which such paving shall be
144 constructed and laid, which lien may be enforced against the property of such street railway company by action in the

District Court for the County in which such improvements has been made; and that said two remedies are the only ones afforded by the said legislative enactment or any legislative enactivement of the State of Oklahoma for the recovery of the cost of making such improvement and laying and constructing such pavement.

13th. That by the terms of Section One of said Ordinance 281, after granting to the said Metropolitan Railway Company of Oklahoma City, and its successors the right to establish, construct and maintain in the streets, avenues and alleys of the City of Oklahoma City as then existing or hereafter extended, a system of electric street railroads, it is provided that "Where any street in any addition to the City of Oklahoma City may have been dedicated subject to any restriction or prohibition against the maintenance or operation of street railway lines thereon, this grant shall be subject to any such restrictions or prohibitions contained in any dedications of any such street or part of street"; and the Oklahoma Railway Company avers that by the laws of the territory of Oklahoma it was, and by the laws of the State of Oklahoma it is, provided (Compl*i*ed Laws of Oklahoma, 1909, Sec. 913) that when a plat or map of any addition or subdivision to any city or town shall have been made out, certified, acknowledged and recorded as required by law,
every grant or donation to the public or to any corporation
145 marked or noted as such on such map or plat shall be deemed
in law and in equity a sufficient conveyance to vest the fee simple or such parcel or parcels of land as are therein expressed, and shall be considered to all intents and purposes a general warranty against such donor or donors their heirs and representatives, to such donee or donees for their use for the uses and purposes therein named, expressed and intended, and for no other use and purpose whatever.

14th. Prior to the time of the taking of any proceedings referred to and recited in the said Alternative Writ of Mandamus by the City of Oklahoma City, or its Mayor and Council respecting the paving referred to therein on Linwood Boulevard, and subsequent to the passage and approval of said Ordinance 281, and the amendments thereto, the Linwood Place Development Company was the owner of certain undeveloped, unsettled, uninhabited land situated in the territory either adjacent to or some distance removed from the City of Oklahoma, not then but now included within the corporate limits of the said City, desiring to sell the said land as residence property, in order to procure street car service for and through the same thereby fitting it for residence uses and purposes, made and entered into a certain agreement with the Oklahoma City and Suburban Railway, its successors and assigns, the said Oklahoma Railway Company, defendant above named being the successor and
assign of said Oklahoma City and Suburban Railway, and
146 being possessed and vested of and with all of the rights of
said Oklahoma City and Suburban Railway in the premises, which agreement was since been executed by the making and filing of plat, dedication and conveyance duly recorded in the office of the Register of Deeds of Oklahoma County, Oklahoma, a copy of such

dedication and plat being hereto attached, made a part hereof as fully as if written out at length herein and marked for identification "Exhibit A", the name of the street in said plat, dedicated and referred to as Shartel Boulevard, having been by an Ordinance of the City of Oklahoma City, copied and shown as "Exhibit B" to this petition, changed to Linwood Boulevard, wherein and whereby, in order to induce said Oklahoma City and Suburban Railway, its successors and assigns, to project, construct, operate and maintain new and additional lines of railway into, through and within the said tract of land, undertook and agreed with the said Oklahoma City and Suburban Railway, its successors and assigns, that if it would project, construct, operate and maintain a new and additional line of railway into, through and within the said land it, as the owner thereof, would, in the manner and form provided by the statutes of Oklahoma, cause to be surveyed and platted and would plat and dedicate the said land and would in the said plat and dedication set apart and dedicate to the Oklahoma City and Suburban Railway, its successors and assigns, a certain private right of way to be used and occupied by it, the said Oklahoma City and Suburban Railway, its successors and assigns, the same to be situated within and as a part of the Street known as Linwood should be
14 located on one side, and the other on the other side, each running parallel with and along the side of the said private right-of-way; which private right-of-way should be reserved for street railway use and for the convenience and safety of the public in traveling over such street; and that the said owner would provide that when and in event the said double drive way should be paved or improved the duty and liability of the Oklahoma City and Suburban Railway, its successors and assignors, the Oklahoma Railway Company being such successors and assignors, and its sole duty and liability with respect to such paving or improvements should be to curb on each side of the said private right-of-way to meet such paving, and to pave across its tracks and street crossings.

The said tract of land was in execution of said agreement accordingly surveyed, platted and dedicated and the said map, plat, dedication and conveyance thereof, respectively were duly filed in the office of the Register of Deeds in Oklahoma County, State of Oklahoma in the manner and with the effect provided by law.

The said dedication, plat, map and conveyance, upon the considerations hereinbefore and hereinafter enumerated with respect to paving, were the considerations and inducements of and to the Oklahoma City and Suburban Railway, and Oklahoma Railway Company, its successors and assignors, to construct, operate and maintain its line of railway over and upon the said private right-of-way, and through the street as a part of and within which the said private right-of-way is situated and the Oklahoma Railway Company expended large sums of money in projecting and constructing, and at a loss persisting until the present time, operating and main-
148 taining said new and additional line of railway over and along the said private right-of-way and through the undeveloped

and largely uninhabited district and territory of land aforesaid, and in full faith and reliance upon the contract so made and manifested by and contained within said maps plats, dedications, and conveyances.

The contract, with respect to said right-of-way through said tract of land referred to in said paragraph was duly executed by the owner of said tract by the execution, filing and delivering by said owner in a manner provided by law of the said map, plat, dedication and conveyance. In which map, plat, dedication and conveyance it was provided, expressed and intended that the said private right-of-way should be, and the same was thereby invested in the Oklahoma City and Suburban Railway and its successors and assigns, the Oklahoma Railway Company, for its exclusive benefit and ownership for the maintenance of a single or double tract line of electric railway thereon, with all switches, cross-overs and all other conveniences or appliances which it may see fit to construct and erect thereon subject to the obligation of the said railway, whenever the streets within and as a part of which the said private right-of-way exists shall be paved, to curb the sides of the said private right-of-way and the ends thereof in line with the curb lines of intersecting streets, to receive such paving, and to pave such rights-of-way across all intersecting streets whenever such intersecting streets shall be paved, each of which obligations, the defendant Oklahoma Railway Com-
149 pany has, as to the streets and crossings referred to and described in the Alternative Writ of Mandamus and in the petition thereof in this cause, duly performed and complied with.

15th. After the said map, plat, dedication and conveyance was made, delivered and recorded as provided by law, the territory and lands embraced with and shown by the same were added to, annexed and made a part of the corporate limits of the City of Oklahoma City, and the streets, avenues, boulevards and alleys shown upon and by the said plat were duly accepted by the said City of Oklahoma City as public highways of the said City, subject to the terms, conditions, limitations and restrictions set forth, contained and made within and by the said dedication, map, plat and conveyance; and the said city of Oklahoma City well knew and was charged with the knowledge of the terms, reservations, conditions, limitations and restrictions meant, the same intended, expressed and shown by the said map, plat, dedication and conveyance. By such acceptance of the same, the said City of Oklahoma City agreed to each and every of the restrictions and conditions set forth in the said map, plat, dedication and conveyance and the same became a contract between the said City of Oklahoma City and the owners and dedicators of the said several tracts of land and the defendant, Oklahoma Railway Company, and is now such contract.

150 16th. By the terms of the said Legislative Enactment of 1907-08 as amended in 1909, it was provided among other things, that when the streets of cities of the first class shall have been ordered paved and shall have been paved as therein provided, the lots, peices or parcels of land fronting and abutting upon any

such improvements shall be charged with the cost thereof to the center of the block where the abutting way is on the exterior of the block, and that each quarter block shall be charged its due proportion of the cost of so paving both the fron- and the side streets on which said block abuts, together with the areas formed by street intersection and alley crossings, except such portion of street intersections and alley crossings as may be used by street or steam railways, which cost shall be apportioned among the lots and subdivisions of such quarter blocks according to the benefits to re assessed to each lot and tract or parcel, as provided in the said enactments; by the said enactments, it is further provided that if any portion of the property abutting upon such improvements shall not be platted into lots and blocks, the Mayor and Councilmen shall include such property in proper quarter block districts for the purpose of appraisement and assessment as provided in the said Act.

151 And it is further provided that as soon as the contract for laying such paving shall re let and the cost thereof ascertained the Mayor and Councilmen of such City shall by resolution appoint three disinterested freeholders of such City to be a board of appraisers, whose duties it is to thereby appraise and apportion the benefits resulting from such paving to such lots and tracts of land in such quarter block areas or districts as shall have been designated by the council, and to make a return of their appraisement to be made in accordance with such appraisement and upon the property found to be so benefitted. By the said Act, it was further provided, as hereinbefore set forth, that all street railways operating within said city shall be required to pave the portion of their tracks situated in such streets and the two feet on each side thereof as the remainder of said street may be so improved, all of such material as the city may require; and when there are two or more tracks of any railway or street railway companies upon one street then said company shall be required to pave as the city may desire also the space between the said tracks. By the said Legislative Enactments, it was further provided that when steam or street railway company shall occupy any portion of the street with its tracks running in general direction of such street or *or* adjacent thereto, that the said

152 railway company shall improve the space between its said track and two (2) feet on either side thereof, in the same manner as said street shall be improved. In order to avoid prolixity, the further terms and provisions of said Legislative Enactment of 1907-08 as amended in 1909, are not herein set forth but of them this court will take judicail notice.

17th. By the Ordinances referred to and recited in the said Alternative Writ and in the petition therefor, the City of Oklahoma City, and the Mayor and Councilmen thereof, did not undertake or attempt to require the plaintiff to pave the space occupied by the private right-of-way above referred to; which private right-of-way, tracks and equipments are the only property or any interest of any character, nature or description belonging to or claimed by the Oklahoma Railway Company in the vicinity of the said paving upon said Linwood Boulevard, or to pave the space between the plaintiff's

tracks laaid within upon and over the said private right-of-way, or to pave the space between said tracks, or to pave two (2) feet on each side of its track lying upon said private right-of-way and situated within such street. No where in said statute or ordinance was the Oklahoma Railway Company required to curb its private right-of-way aforesaid to meet the paving on the said double drive way, but that in accordance with the obligations imposed upon it in the said dedication and contract the plaintiff did on said Linwood Blvd. between said streets set the said curb upon each side of its said private right-of-way.

153 18th. That the City of Oklahoma City and the Mayor and Councilmen thereof did not cause the City Clerk of Oklahoma City to Give notice to defendant corporation of the final determination to have pave- any of the streets respectively ordered to be paved by the resolution hereinbefore set out nor did the said City Clerk give defendant corporation such notice, as required by the provisions of Section VI of the said Ordinance No. 281 above set out.

19th. That the sole and only obligation resting upon defendant to pave or pay the cost of any paving of any street upon, over or along which its track or tracks may be constructed, is the obligation imposed by the terms and provisions of the said Sections I and VI of said Ordinance No. 281, and that as to no part of the paving ordered and provided for *gy* the several resolutions as to which assessments were made and levied by the several ordinances hereinbefore set forth was or is the defendant in the premises under any obligation of any nature to either construct or pay the cost of constructing any portion thereof.

20th. In the premises the Oklahoma Railway Company says that under the said two Legislative Enactments and under the said Ordinances it is not liable for and cannot be made liable for either the paving or the cost of paving any part or portion of the street aforesaid; that its said private right-of-way is a part of the street and does not abut upon the street, and in the premises cannot be subjected to assessment for the payment of the cost of constructing such paving as abutting property; that its said private right-of-way is not susceptible of benefit resulting from such paving, and in the prem-

154 ises, under the law and under the constitution of the State of Oklahoma cannot be subjected to paving *of* paying for the cost of paving said double driveway; and that any Legislative action by the City or Oklahoma City, the Mayor and Councilmen or Commissioners thereof, whether made voluntarily or pursuant to the mandatory order of this court in this proceeding, in the premises will impair, destroy and render valueless the power and rights conferred upon and contracted to the Oklahoma Railway Company by the terms of the said ordinance No. 281 and by the terms of the said plat, dedication, map, conveyance and contract, contrary to and in violation or the provisions of the constitution of the United States wherein and whereby, in Article I, Section 10, it is provided among other things that "No state shall pass any law impairing the obligations of contracts"; and will deprive the Oklahoma Railway Com-

pany of its property and property rights without due process of law contrary to and in violation of the provisions of the fourteenth amendment to the constitution of the United States wherein and whereby it is provided, among other things, "Nor shall any state deprive any person of life, liberty or property without due process of law"; and will deprive the Oklahoma Railway Company of the equal protection of the law, contrary to and in violation of the said Fourteenth Amendment to the Constitution of the United States wherein and whereby it is provided, among other things, that no state
155 shall "deny any person within its jurisdiction the equal protection of the law"; and the Oklahoma Railway Company hereby prays the benefit and protection of the Constitution of the United States and Amendments thereto above set out.

Wherefore: The Oklahoma Railway Company objects and excepts to the making of the order made and contained in the Alternative Writ of Mandamus in this cause, and demands dissolution of the same, in so far as its effects the Oklahoma Railway Company or its property or any of its property, and objects and excepts to the making of any amendatory order upon the defendants, the city of Oklahoma City or said City Commissioners which would result in any legislative action on the part of such defendant subjected or intended to subject the Oklahoma Railway Co., or any of its property, to the payment of or to assessments for the payment of the cost or any part thereof of making such improvements and upon the consideration of this Return it prays that it may be dismissed hence with its cost, and for such other and further relief as it may by the court be found and considered in the premises to be entitled.

SHARTEL, SHARTEL & SHARTEL,
ASP, SNIDER, OWENS & LYBRAND,
Att'ys for Okla. Ry. Co.

156 STATE OF OKLAHOMA,
County of Oklahoma, ss:

Charles Hoopes, of lawful age, being first duly sworn on oath deposes and says:

That he is Secretary of Oklahoma Railway Company, one of the defendants named in above numbered and entitled cause; I have read the within and foregoing return to the alternative writ of mandamus issued herein and the statements made and contained therein are true.

CHARLES HOOPES.

Subscribed and sworn to before me this 6th day of November, 1913.

[SEAL.] CLAIRE L. WEBB,
Notary Public.

My commission expires June 3, 1917.

157 Continuation of Abstract of Title to the Lands Described in the Caption Hereto.

Entry No. — Plat.

Linwood Place Addition to Oklahoma City, Okla.

Filed for record Nov. 29th, 1909, at 5:00 P. M., and reported book 13 plat pages 82 and 83.

Know All Men by These Presents:—That the Linwood Place Development Company, a corporation, being the owners of the North-half of Section 25, T. 12, N. R. 4, West of the Indian Meridian, except Ten (10) acres out of the North-West Corner, have caused a part of the same to be subdivided into Lots, Blocks and streets, and the maker of this instrument has caused to be made a correct plat heretofore described as surveyed and platted, which plat is attached hereto and adopted, published and recorded as Linwood Place Addition to Oklahoma City, Oklahoma, and we hereby dedicate to the public for the ordinary purposes of travel all the streets, avenues and boulevards as shown on said attached plat; but this dedication is subject to the following provisions, conditions and reservations, which are made a part hereof, to-wit:

A strip of land Forty (40) feet wide, being Twenty (20) feet on each side of the Center line of Shartel Boulevard, as platted North and South and East and West through said Addition; also a strip of land Thirty-three (33) feet in width, being Sixteen and One-half (16½) feet on each side of the center line from Shartel Boulevard North on Drexel Boulevard.

Said strips of land are set aside for the exclusive use of and dedicated to the Oklahoma City and Suburban Railway, its successors and assigns, with a like effect as though deeded and conveyed to said Company in fee simple by separate deed, subject, however, to the following conditions:

Said Oklahoma City and Suburban Railway shall be subject to all the reasonable police regulations and shall provide crossings over its tracks at all street crossings and when said Boulevards are paved said Company shall curb its private right of way and pave street crossings ever same.

The dedication of all other streets outside of those portions specifically reserved, excluded and excepted in this certificate as above mentioned, is upon the distinct understanding and condition that no street or surface Railway shall ever be constructed along any of such streets without the consent of the owners of the property in excess of three fourths of the total frontage along the street or streets in said addition to be occupied by such railways Sixteenth (16th) street and Twenty-third (23rd) Street from Shartel and Drexel Boulevard West are excepted from the above conditions.

No City, town or Municipality shall ever at any time have the right to use for itself, or to grant to any person, firm or corporation

the right to use any of the streets, avenues or boulevards for the erection of any poles for the support of wires at any time, but all such poles shall be erected along the rear lot lines as shown by this plat, and so placed as not to interfere with the stables or outbuildings.

Foundations to said stables and out buildings not to be built closer than three (3) feet to the rear lot line, said Three (3) feet off the rear of all lots under surface is hereby dedicated to the use of public sewers, gas and water pipes.

158 Continuation of Abstract of Title to the Lands Described in the Caption Hereto.

Entry No. —.

Plat Sheet No. 2. Book 13, page 82, 3, 4.

It is hereby provided, however, that said Railway Company having the right to use said street shall have the right to erect trolley poles along its tracks and that any Electric Light Company, using the rear lot lines for its main line shall have the right to put in such poles as are necessary to maintain street light.

Restrictions.

Any person or persons hereafter becoming the owners of any lots, blocks or tracts hereby platted, shall take and hold the same subject to the following conditions, to-wit:

1. The building line shall be as shown on said plat; On all lots over one hundred fifty (150) feet in depth, Forty (40) feet from the front property line, on all lots one hundred fifty (150) in depth thirty-five (35') from the property line, and no buildings or any portion thereof shall at any time be erected or placed upon the space between the said building line, and the front property line, nor extend into or encroach upon said space.

2. No residence, the actual cost of which shall be less than two Thousand ($2000) dollars shall be built on any of the lots on Sixteenth (16th) of Twenty-third (23rd) Streets. No residence the actual cost of which shall be less than three thousand ($3000) Dollars shall be built on Seventeenth (17th) Twenty-first (21st) and Twenty-second (22nd) Streets: No residence, the actual cost of which shall be less than Four Thousand ($4000) Dollars and which shall be less than two (2) Stories shall be built on Eighteenth (18th) or Twentieth (20th) Streets. No residence the actual cost of which shall be less than Five Thousand ($5000.) Dollars, shall be built on Shartel Boulevard, Drexel Boulevard or Grand Boulevard All residence- along the Boulevard to be built of stone or brick and to be at least two (2) Stories.

3. No residence shall be built closer than twenty (20) from the East Lot line on all streets running East and West with the exception of Sixteenth (16th) and Twenty-third (23rd) Streets, where no

residence shall be built closer than Ten (10) feet from the East Lot line. No residence shall be built closer than twenty-five (25) feet from the south lot line on Shartel Boulevard, Drexel Boulevard or Grand Boulevard.

4. All residence- on Sixteenth, Seventeenth, Eighteenth, Twentieth, Twenty-first, Twenty-second, and Twenty-third Street, shall be built facing North and South. All residence- on Drexel Boulevards shall face East and West and all residence- on Shartel Boulevard shall face the Car line, all residence- on Grand Boulevard shall face Boulevard.

5. But one building shall be erected or placed upon each lot and such building shall never be used for any purpose except for private residence exclusively, no*t* shall any part or portion thereof ever be used or occupied for business of any kind whatsoever.

6. On all corner lots no barn stable or out building shall be built closer than Fifty (50) feet to the side street, with the exception of Sixteen and Twenty-third which shall be Twenty-five (25′) feet.

7. No city, town, Municipality, private person, Firm or Corporation shall ever have the right to build any side-walks on the street in said addition less than Five (5′) feet in width, and all side-walks so buil*d* must be constructed of materials as provided by the Ordinances of the City of Oklahoma City, and the inside line of side walks shall

159 Continuation of Abstract of Title to the Lands Described in the Caption Hereto.

Entry No. —.

Plat Sheet No. 3 Book 13 page 82, 3, 4.

be Five (5′) feet from the lot or property line, and no retaining wall shall be built between said side-walk and the property line, and no retaining wall shall be built between said side-walk and the property line. No signs, bulletins, or bill-boards that are larger than Eighteen by Twenty-four (18x24″) inches shall be placed on any portion of this addition, or painted on any building thereof, and any such signs, bulletin or bill board shall be a common nuisance, and may be abated by these grantors, or by any owner of property in said addition. This provision shall not apply, however, to signs painted on or attached to business therein, and shall not apply to signs offering for any lots or lot in said addition.

8. Block number Thirty-eight (38) is hereby set apart and reserved and excepted from the provisions of this dedication and none of the foregoing restrictions shall apply to this Block.

9. No lot or lots in this adddition shall ever be owned, held, or occupied by any person of African descent, commonly known as Negroes.

10. Any property owner in this addition shall have the right to

enforce any of the provisions contained herein or to prevent their violation by the proper action in Court.

Signed this 29 day of November 1909.

[SEAL.] LINWOOD PLACE DEVELOPMENT CO.
By C. E. BENNETT,
President.

Attest:
L. L. LAND,
Secretary.

STATE OF OKLAHOMA,
County of Oklahoma, ss:

Before me, L. C. McClure, a Notary Public in and for said County and State on this 29th day of November 1909 personally appeared C. E. Bennett to me known to be the identical person who subscribed the name of the maker thereof to the within and foregoing instrument as its President and acknowledged to me that he executed the same as his free and voluntary act and deed and as the free and voluntary act and deed of the said corporation for the uses and purposes therein set forth.

Witness my hand and notarial seal this 29th day of November 1909.

[SEAL.] L. C. McCLURE,
Notary Public.

My commission expires April 20th, 1912.

I, Warren E. Moore, a resident of Oklahoma County, Oklahoma, hereby certify that I am by profession a Civil Engineer and that at the instance of the above named part I made the above described sub-division and that the annexed map or plat is a correct representation of said land as subdivided by me.

Signed this 29th day of November 1909.

WARREN E. MOORE,
Civil Engineer.

STATE OF OKLAHOMA,
County of Oklahoma, ss:

Before me, L. C. McClure, a Notary Public in and for said County and State on this 29th day of November 1909 personally appeared Warren E. Moore, to me known to be the within and foregoing instrument and who acknowledged to me that he executed the same as his free and voluntary act, and deed for the uses and purposes therein set forth.

Witness my hand and Notarial seal this 29th day of November 1909.

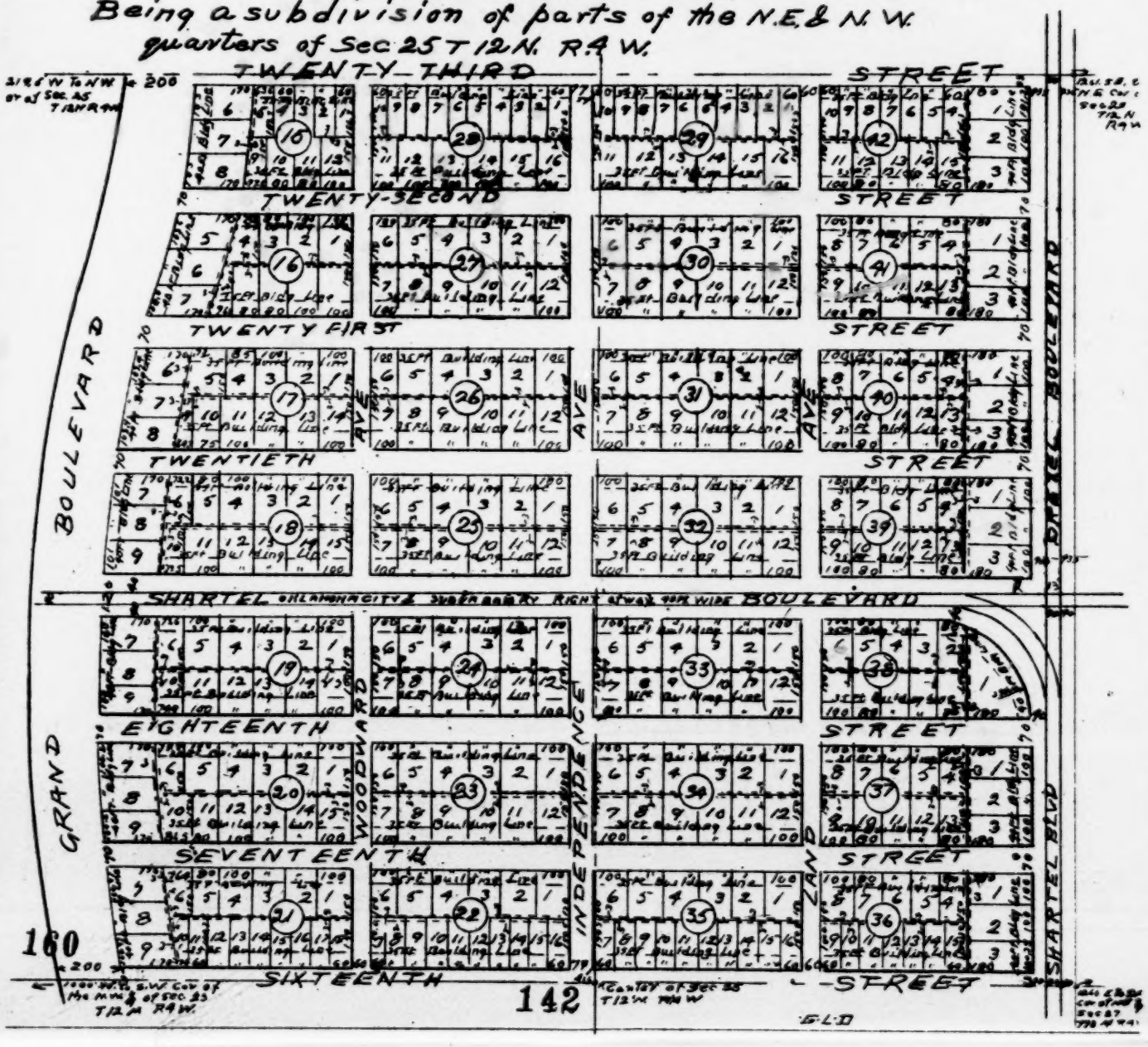
[SEAL.] L. C. McCLURE,
Notary Public.

My commission expires April 20th, 1912.

(Here follows diagram marked p. 160.)

LINWOOD PLACE

Blocks 15 to 42 inclusive.
Being a subdivision of parts of the N.E. & N.W. quarters of Sec 25 T 12 N. R 4 W.



161 Continuation of Abstract of Title to the Lands Described in the Caption.

Entry No. —.

Ordinance.

Filed Dec. 6, 1909, at 8 A. M., Recorded Book 10, Misc., Page 562.

Ordinance No. 1159 (Published Dec. 4, 1909).

An Ordinance Changing the Names of Certain Streets and Avenues in Oklahoma City to That of Linwood Boulevard.

Be it ordained by the Mayor and City Council of the City of Oklahoma City, Oklahoma.

Section 1. That the names of the following streets and avenues in the city of Oklahoma City, Oklahoma, as shown by the recorded plats of certain additions to Oklahoma City be and the same is hereby changed to and shall be known and designated as follows: 7th street as platted on the south of blocks C. & D. Fairview Addition to Oklahoma City from the west line of Western Ave. to the center line of Warner Ave. and a portion of a street commonly known and referred to as 6th street lying south of the south line of 7th street as platted in Fairview Addition and north of block C, Neas Addition, extending from the west line of Western Ave. to the easterly line of Neas Boulevard; Neas Boulevard from the west line of Western Ave. to the center line of Ames Ave.; 6th street from the center line of Ames Ave. to the east line of Virginia Ave.; Virginia Ave. from the south line of 6th street, the same being the north line of lot 13, Block 19, Bell Vern Addition to the east line of Pennsylvania Ave.; 10th street from the west line of Virginia Ave. to the west line of Pennsylvania Ave.; Pennsylvania Ave. from the north line of 10th street to the north line of 13th street; 13th street from the west line of Pennsylvania Ave. to the center line of May Ave.; Shartel Boulevard from the center line of May Ave. to the west line of the Grand Boulevard to the name of Linwood Boulevard.

Section 2. That the City Clerk upon passage, approval, and publication, shall under seal of his office certify a copy of this ordinance to the Register of Deeds of Oklahoma County, who shall place the same upon record, whereupon the names and titles of said street shall be officially changed and names as herein certified.

Section 3. That this ordinance shall take effect and be in force

from and after its passage, approval and publication as required by law in the Daily Oklahoman.

Passed by the Council this 1st day of Dec., 1909.
Approved by the Mayor this 2nd day of Dec., 1909.

HENRY M. SCALES,
Mayor.

Attest:
BOB PARMAN,
City Clerk. [SEAL.]

I, Bob Parman, City Clerk of the City of Oklahoma, do hereby certify that the above and attached ordinance No. 1159 is a true and correct copy of the original ordinance as same appears of record in my office.

[SEAL.] BOB PARMAN,
City Clerk.

The Central Title and Investment Company, bonded abstracter.

162–220 Endorsements: In the District Court of Oklahoma County, Oklahoma. No. 13,794. The Severns Paving Company, a corporation, Plaintiff, vs City of Oklahoma City et al., Defendants. Return to Alternative Writ of Mandamus. Filed in District Court, Oklahoma County, Oklahoma, November 6, 1913. Thos. E. Kerby, Clerk, by Nina E. Babcock, Deputy. Shartel, S. & S. Asp, Snyder, Owen & Lybrand, Attorneys for Okla. Ry. Company.

221 In the District Court of Oklahoma County, Oklahoma.

#13,794.

THE SEVERNS PAVING COMPANY, a Corporation, Plaintiff,

v.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, et al., Defendants.

Reporter's Transcript.

Be it remembered, that on the 20th day of February, 1914, the same being a judicial day of the regular January, 1914, Term of the above named Court, the above entitled cause came regularly on to be heard before the Honorable Geo. W. Clark, Judge, upon the application for mandamus and the return to the alternative writ; plaintiff being represented by Ames, Chambers, Lowe & Richardson, and the defendant, Oklahoma Railway Company, being represented by Asp, Snyder, Owen & Lybrand, and the defendants, City of Okla-

homa City, and the Commissioners of said city, being represented by its and their attorney, Colonel J. W. Johnson; all parties announcing ready for trial, whereupon the following proceedings were had and done, to-wit:

222 By Judge Ames: In 13794, we wish to offer in evidence a certified copy of the transcript of the proceedings, which is marked Exhibit A-13,794.

By Mr. Snyder: Now, we make the same objection to this that we made to a like abstract of proceedings in the other case.

By Judge Ames: And we offer in evidence Exhibit B-13,794, which is the demand for re-assessment, served on the Commissioners of the City of Oklahoma City on or about April 26, 1913.

By Mr. Snyder: Same objection as to the like paper in the former trial.

By Mr. Asp: And incompetent, irrelevant and immaterial, and not responsive to any issue in this case.

By the Court: The same questions are raised as before, in the other case.

By Mr. Asp: Yes, sir.

By the Court: Overruled.

By Mr. Asp: Exception.

By Judge Ames: Now, as to the case, it is admitted that all of the evidence offered in 13,793, except the transcript of the proceedings and the notice served on the Commissioners may be considered in evidence in this case, subject to the same objections and exceptions that have been reserved in that case.

By Mr. Snyder: And that the same objections and exceptions as were reserved in that case to the abstract of the proceedings offered there, are likewise made and exceptions saved in this case to Exhibit A.

223 The evidence offered in Case No. 13,793, except the transcript of the proceedings and the notice served on the commissioners, and the objections and exceptions which were reserved in that case, referred to on the foregoing page, are as follows, namely:

By Mr. Snyder: Before any testimony is introduced, I would like to make these objections:

By Mr. Snyder: The defendant, Oklahoma Railway Company, objects to the introduction of any evidence in this case on behalf of the plaintiff and against the defendant, Oklahoma Railway Company and upon behalf of the defendant, City of Oklahoma City, as against the Oklahoma Railway Company, on the grounds and for the reasons following, to wit:

First. Neither the petition for the alternative writ of mandamus, nor the alternative writ of mandamus, herein, state facts sufficient to constitute a cause of action against the defendant, Oklahoma Railway Company, or state facts sufficient to entitle the plaintiff or the defendant, City of Oklahoma City, to any relief against the defendant, Oklahoma Railway Company.

Second. Said alternative writ of mandamus and the mandatory order prayed in the petition for mandamus to be made, herein, are and involve an unlawful and unauthorized attempt to compel the defendant, The City of Oklahoma City, the Mayor and the Commissioners thereof, to the prejudice of the defendant Oklahoma Railway Company, to exercise a discretion, the compelling of the exercise of which discretion, under the laws of the State of Oklahoma, is not within the power of this or any other Court.

224

By the Court: I don't know that it makes much difference when this question is presented here; if we are going to have any evidence you had better introduce it, and then you can argue there propositions.

By Mr. Snyder: Does the Court overrule the motion?

By the Court: Yes.

By Mr. Snyder: Exception.

CHARLES T. DERR, being called as a witness in behalf of the plaintiff, testified as follows, after having been first duly sworn.

Direct examination by Judge Ames:

Q. State your name to the Court.

A. Charles T. Derr.

Q. What office, if any, do you hold in the Severns Paving Company?

A. I am vice-president and secretary.

Q. Did you serve a demand on the Commissioners of the City on or about the 26th day of April, 1913, relative to the re-assessing of this paving?

A. I did.

Q. Is that a copy of the demand that you served?

A. It is.

Judge Ames: If your Honor please, we had a subpœna duces tecum issued to Mayor Grant to produce the original, and Colonel Johnson said they could not find it.

225

By Mr. Asp: Well, what is it?

By Judge Ames: It is a demand on the city to re-assess.

Col. Johnson: So far as the city is concerned, it is admitted the demand was made.

By Mr. Asp: We object to this as incompetent, irrelevant and immaterial, but not that it is not the original.

By the Court: Overruled.

By Judge Ames: We offer Exhibit A, being the demand referred to, in evidence.

(At this point in the evidence in Case No. 13,973, appears the notice to the commissioners of the city of Oklahoma City, given with reference to the paving from the center line of Tenth Street to the center line of Sixteenth Street.)

Q. The paving was completed, was it, between the center line of Tenth Street and the center line of Sixteenth Street, on Linwood Boulevard?

A. Yes, sir.

Q. After the paving was completed, were the certificates or bonds issued and delivered to the plaintiff in the case?

A. They were.

Q. Do you still hold those certificates or bonds?

A. We do.

Q. Is the paper I now hand you, marked Exhibit B, a certified copy of the proceedings showing the various steps toward the ordering and paving of that street and the issuance of the bonds?

A. It is.

By Judge Ames: It is admitted, if your Honor please, that this certified copy may be treated as the original so far as its com-
226 petency is concerned, and we offer in evidence this certified copy of the proceedings before the city council, relative to the subject.

By Mr. Snyder: Now, it isn't objected to for the reason that it isn't a true and correct copy; but the railway company objects to the introduction of this for the reason that it fails to show anything particularly or fails to contain any proper description of any property of the Oklahoma Railway Company that is subject to assessment as for benefits, and it fails, further, to show that there was included in the order appointing appraisers a description or a proper description or any definite description of any land of the Oklahoma Railway Company which could be subject of assessment for benefits, and that no such land of the Oklahoma Railway Company, subject to assessment, as for benefits, was designated in the resolution appointing appraisers, or in the exhibit attached to that resolution; and the objection is made to the entire abstract or to the entire number of these exhibits, on the ground that they are incompetent, irrelevant and immaterial, but not upon the ground that they are not accurate and correct copies; and an objection is made on the further ground that the description or any attempted description of the property of the Oklahoma Railway Company is——

By the Court: The objections that you are making, then, to the document, are the ones that you have particularly specified
227 and not included in your general objection as incompetent, irrelevant and immaterial—that that blanket objection, in other words, don't apply to this objection.

By Mr. Snyder: Yes.

By the Court: No, it can't apply if the Court wants a specific objection. I am willing to go almost the entire length of this, but——

By Mr. Asp: Make your objection specific.

By Mr. Snyder: We object specifically, in addition to the other specific objections heretofore made to the paving resolution No. 136, which appears on the 2nd page of Exhibit, for the reason that in the resolution and in the notice resulting from the publication of the resolution, there is no indication or description of any property of

the defendant, Oklahoma Railway Company, subject to the assessment which would result from making that resolution. (Reads the resolution.)

By the Court: The particular objection that you make to that particular paper that you read is that your property isn't subject to assessment, isn't it?

By Mr. Snyder: Yes.

By the Court: Then there is no use of incorporating a thousand objections to that particular document. You say that they don't describe any particular tract of land; it doesn't.

By Mr. Snyder: No, that isn't my objection. My objection is that it doesn't refer to any tract of land that the Oklahoma Railway Company has in that neighborhood or in that district.

228 By the Court: And you make that objection to each of these documents?

By Mr. Snyder: Yes.

By the Court: Then there is no use of going over each one of these particular documents.

By Mr. Snyder: We make the general objection as to each particular paper not referring to any property of the Oklahoma Railway Company which might be the subject of an assessment for benefit.

By the Court: I understand, then, that the only description of the property of the railway company in the documents referred to, is the property that is referred to as the Oklahoma Railway right-of-way?

By Mr. Snyder: Yes.

By the Court: And that is the designation in these documents, and the only designation of the property of which you complain?

By Mr. Snyder: No, that is the only designation in the report of appraisers and in the exhibit A attached to the order appointing appraisers. But the other objections went to this point: That nowhere in the preliminary resolution, or in any resolution affecting this, is there any description, of a general character, as being subject to assessment for benefits, which would include any kind of property that the Oklahoma Railway Company has in that immediate district.

By the Court: Is it your contention that this property wasn't laid out in blocks?

By Mr. Snyder: Absolutely, yes; it is a part of the street and it can't abut on the property. Our whole statute is predicated

229 on the abutting property.

By the Court: Your contention is that the land that is assessed as the railway right of way isn't divided into blocks at all?

By Mr. Snyder: Yes, it is a right of way.

By the Court: Objection overruled.

By Mr. Snyder: Exception.

Plaintiff's Exhibit B, the instrument above referred to, offered and admitted in evidence over the objection of defendant, is in words and figures as follows, to wit:

(At this point appears a certified copy of the proceedings in Case No. 13,793.)

Direct examination by Judge Ames (Continuing):

Q. Has the railway company paid any of this assessment?
A. No, sir.

That is all.

Cross-examination by Mr. Snyder:

Q. You will get the plans—the blue print prepared by the city engineer, according to which this work was done?
A. Yes, sir.
Q. And that will show that there was nowhere in the specifications a recommendation or any indication that the Severns Paving Company was either to pave across street intersections or to place curbs in on the two sides of the right of way of the Oklahoma Railway Company in the street?

By Judge Ames: That will show for itself; objected to for the reason that it is not the best evidence.
By the Court: Sustained.
230 By Mr. Snyder: Exception.

Q. Well, did your company build the curbs on each side of the Oklahoma Railway Company, through there?
A. Not on each side along the right of way.
Q. Well, on each side of the right of way?
A. No, did not; no, sir.
Q. You didn't pave across the street, across the right of way at street intersections?
A. As a rule we did not; I am not positive whether we paved across Sixteenth Street or not.
Q. Is Sixteenth Street paved across?
A. It seems to me, although I won't say positively.
Q. You won't say you did pave across there?
A. I won't say we did or we did not. The plat that I have will show it, though.
Q. And you were not ordered by the city to do that—to put these curbings in?
A. No, not to put the curbings in.
Q. Or to pave across Sixteenth Street?
A. I won't say about Sixteenth Street.

All right.

Redirect examination by Judge Ames:

Q. Isn't it your recollection that you did pave across Sixteenth Street?

A. It may be; the plat is in your office, Mr. Ames, and that plat will show just exactly what was done. It has been so long ago that I don't want to state what was done without having that plat here.

That is all.

Witness excused.

231 By Judge Ames: Now, if your Honor please, we desire to admit some of the allegations of the returns of the Oklahoma Railway Company. Commencing on the 4th page of this return the allegations are numbered. We wish to admit the facts alleged in the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 11th paragraphs, as so numbered; and we also wish to admit that the Exhibits attached, marked A, and the blue print attached to Exhibit A; the Exhibit marked B, and the blue print showing amended plat of Millers Boulevard; the Exhibit marked C, and the blue print thereto attached, of Shartel Boulevard Addition; the Exhibit marked D, and the blue print thereto attached, and the Exhibit marked E, and the blue print thereto attached, are correct copies of the originals.

By Mr. Snyder: Now, you will also admit—there was another Exhibit—Exhibit F——

By Judge Ames: And Exhibit F, and the blue print thereto attached, and Exhibit G are also admitted as true and correct.

Plaintiff rests.

By Mr. Snyder: The defendant Oklahoma Railway Company demurs.

By the Court: What would you do if I overruled your demurrer; would you introduce some evidence?

By Mr. Snyder: Well, I don't know.

By the Court: Well, I am going to overrule it just to see.

By Mr. Snyder: Exception, on the ground that the Court isn't stating any legal reason for it.

232 By the Court: Well, I want to see whether you have got any legal excuses for kicking on this assessment.

By Mr. Snyder: Just add to our demurrer: For the reason that the evidence introduced is not sufficient and the facts shown by the evidence introduced are not sufficient to entitle the plaintiff to the relief prayed, or to any relief against the defendant Oklahoma Railway Company.

JOHN W. SHARTEL, being called as a witness in behalf of the defendant, testified as follows, after having been first duly sworn:

Direct examination by Mr. Snyder:

Q. State your name to the court.
A. John W. Shartel.

Q. What is your connection with the Oklahoma Railway Company?

A. I am vice-president.

Q. How long have you been connected with the Oklahoma Railway Company?

A. Since its inception in 1902; well, since its organization in 1904.

Q. Prior to that time you were connected with the Metropolitan Railway Company?

A. Its predecessor, from 1902.

Q. Are you familiar with the line of railway now being operated by the Oklahoma Railway Company over private right of way on Linwood Boulevard from 10th Street west and north to 16th Street?

A. I am.

Q. State the physical situation existing there, Mr. Shartel.

A. At the present time?

233 Q. Well, state at the time—do you remember when the paving was done out there?

A. It is my recollection that it was in the fall of 1911.

Q. At that time what was the condition—the physical condition existing there?

A. The Linwood Boulevard, from 10th Street to Grand Boulevard, is a distance of about three miles; the settled portion of the city stopped, at that time, about a quarter of a mile east——

Q. That is, nearer town?

A. —— of the junction of 10th and Linwood; there were a few scattering houses on 19th about two blocks east of Linwood; there were about nine or ten houses on the southeast quarter of the subdivision known as Englewood, most of them a block or two back from the track. There were about a dozen houses in the northeast quarter of the Englewood tract. These two 40-acre tracts I refer to would lie a quarter of a mile west of the corner of 10th and Linwood, and running a half mile north and comprising eighty acres; the next quarter of a mile, being a quarter of a mile both to the north and south of the Linwood line had no settlement and no houses at all. It was partly cultivated land and partly an alfalfa field. The next half mile, known as Miller's Addition, had about a dozen houses on it, some considerable distance back from the track. The next half mile beyond Miller's Addition had very few houses, — I think three or four and possibly five. That carried the line to Sixteenth Street. You don't care for anything beyond Sixteenth?

Q. Yes. Now, did this condition exist about the time the railway was built out there?

A. No; at the time the railway was built it was all raw

234 prairie, and practically no houses, except farm houses.

Q. How many families, at that time, would you say lived along the line of railway from 10th Street all the way to Grand Boulevard?

A. At the time the railway was first built to Young Boulevard, quarter of a mile west and a quarter of a mile north of 10th and

what is now Linwood Boulevard (it stopped there for sometime) there were no houses west of Pennsylvania Avenue; I think that was in 1904 or 5 that the line was built that far,—possibly in 1906. I think in 1908, or 9—possibly the beginning of 1909, the line was extended from Young Boulevard west on what was then 13th Street, (now Linwood for a half a mile to the center of Miller Addition. In 1910 it was extended—the Oklahoma Railway built from the center to the west side of the Miller Addition—to May Avenue, and the Oklahoma City and Suburban took it up there and built from May Avenue west about a quarter of a mile, and north—well, followed the present route of Linwood Boulevard from there to Grand Boulevard. When the Oklahoma Railway or the Suburban Railroad built into these additions, they were all wild prairie, and they are almost that yet.

Q. There is a little settlement along clear out to the west end of the line?

A. A scattering settlement.

Q. Yes; a couple of miles through there on each side will not average a house to the half mile will it?

A. Well, hardly that bad. The houses are so thin that it don't look like a town.

Q. What connection did you have with the Oklahoma City and Suburban Railway?

235 A. Officially I didn't have any; I was the whole thing, though, behind it. The officers and directors of the road were all dummies, and it was a mere construction company for the Oklahoma Railway.

Q. And the work of constructing that portion which was done in the name of the Oklahoma City & Suburban Railway, was taken over pursuant to the plans that existed at the time of the construction, by the Oklahoma Railway Company?

A. The Oklahoma City & Suburban Railway was a subsidiary of the Oklahoma Railway Company, and I directed all of its affairs and controlled it, as well as the construction matters of the Oklahoma Railway Company, as to what line should be constructed; how they should be constructed; and in making all contracts for rights of way, and generally directed the development of the system.

Q. Mr. Shartel, I call your attention to the exhibits attached to the return of the Oklahoma Railway Company, to the alternative writ of mandmaus in this case, marked consecutively Exhibit A to F, inclusive, and will ask you whether, prior to the making of the dedications there, you had had any arrangement with the several respective owners of those several tracts of land regarding the construction and operation of a railway along the line of the private right of way running through the streets indicated on these plats, and connecting up on that Linwood Boulevard line?

A. I had negotiations with each of the owners leading up to the filing of these plats.

Q. What were those negotiations, Mr. Shartel?

By Judge Ames: Objected to as immaterial.

By the Court: Sustained; I understand they are in the documents themselves.

236 By Mr. Snyder: Yes, but if your Honor please, the object of this question is to bring out the matter of the consideration to the railway company for going out there, and it helps interpret the plats, and the answer of the witness will show that he is prepared to answer that it was the only consideration under which the railway company would go and build this line out there; that it knew it would be losing money for a long period of time, and where it is still losing money.

By the Court: I understand the instrument itself shows the consideration. Do you desire to show that that isn't correct?

By Mr. Snyder: No, the instrument doesn't; the instrument shows what was done. Now, we desire to show the consideration.

By the Court (After argument): I will sustain the objection.

By Mr. Snyder: Exception.

Q. Has the Linwood line of road, ever since it has been first constructed, been a paying proposition?

By Judge Ames: Objected to as immaterial.

By the Court: Overruled. I don't see what difference it makes. He may answer it.

A. It has not. The operation has entailed a very heavy loss.

Q. That loss continues to this day?

A. It does.

Q. Now, referring to the exact physical conditions as to driveways and as to roadway along that private right of way; will you explain that to the court?

237 A. From 10th and Linwood to Linwood and 13th Street, a distance of 1140 feet, the right of way is thirty-three feet in width,——

By the Court: Don't this plat show that?

By Mr. Derr: Yes, it is shown on the plat.

By Mr. Shartel: It won't show the results of these figures, though.

By Judge Ames: Go ahead then.

A. (Continuing:) From Linwood Boulevard and Pennsylvania Avenue West to Villa Street, a distance of 2632 feet the right of way is thirty feet wide; From Villa Avenue to May Avenue, 2684 feet it is thirty feet wide. From May Avenue to 16th Street, 2553 feet, it is forty feet wide; from 16th to the end of the track 3718 feet——

By Mr. Ames: Well, that is beyond this paving district.

By Mr. Snyder: Yes, it is in two suits; that is the other case.

A. Well the entire superficial area of the right of way from 10th to 16th street, on Linwood Boulevard, is 6.87 acres, making no deductions for street intersections. Linwood Boulevard, from 10th

to 13th street and Pennsylvania, is 106 feet wide; from there to May Avenue it is 100 feet wide; from May Avenue to 16th Street, is 120 feet wide; it is divided into three sections; the parking and sidewalks on each side next to the property, a driveway and the right *right* of way in the middle. The center line of the right of way is the center line of the street or boulevard. The entire distance from 10th to 16th is occupied by one single track, with the exception of a meet point, a short siding, at or near the center of Miller's Boulevard Addition, and a small amount of double track just west of
238 Pennsylvania Avenue. The track construction consists of a center pole with brackets suspending the trolley above, and the right of way preparatory to the paving, was all curbed by the company, and the right of way was also reduced to the established grade of the city. At the times these lines were built and the dedications made of the streets, and right of way, none of the property was within the city limits.

Q. That private right of way is susceptible of what use?

A. I don't think it could be put to any other use, except a railroad,—a trolley-line.

Q. Is it valuable for any other purpose?

By Judge Ames: Objected to as immaterial.

Q. Or was it, at this time, valuable for any other purpose, or at the time this paving was done?

By the Court: Overruled.
By Judge Ames: Exception.

A. Why, I don't believe it had any value for any other purpose but that. Possibly it might have had some value, or would have had some value, at some time, for the purpose of widening out the street, if the occasion had ever required it. That would be the only value that I could think of that the property could ever have, except for a railway over it; or possibly it might be used in beautifying the town, if there were no railroad there, as a part of a public park system, by planting it; but it would have no use for commercial purposes, whatever.

Q. Are you familiar with real estate values in Oklahoma City in 1910, 1911 and '12, and in that neighborhood?

A. I am.

Q. Are you familiar with the value of that property, as it was platted there, prior to the time the paving was made?

A. I am.

239 Q. What would you say was the value of that for the use to which it could be put, if any use to which it could be put, immediately prior to the commencement of these proceedings to pave the Linwood Boulevard?

By Judge Ames: Objected to as immaterial.

By the Court: It is your contention that you can go into that matter, without bringing in everybody that is interested in the prop-

erty along the line to show the relative values of the two? Are they to be bound by a hearing where the question of values is gone into——

By Mr. Snyder: If your Honor please; everybody that owns property there is a party to this suit.

By the Court: Have they all been served?

By Mr. Snyder: Yes sir, I think they have. But that isn't the object of this question.

By the Court: Well, what is it?

By Mr. Snyder: The object is to show that no benefit accrued to this land from making these improvements.

By Mr. Snyder (After argument): We offer to show by this witness, in response to this line of questioning, in answer to these questions and the questions which will be propounded following them, that this land was never, at any time, worth more than $800.00 an acre, for any purpose; that prior to the making of the improvements that it was worth approximately $500.00 an acre; that after the making of the improvements involved here that it was worth $300.00, and that the fact that the paving was placed in there along the two sides of the right of way had decreased the value of the property materially for the use to which the street railway could put it, because of modern conditions of travel involving the use of automobiles, and the *cast* of private travel by private vehicles in preference to travel over a street railway line.

240

By Mr. Ames: We object to it as incompetent, irrelevant, and immaterial.

By the Court: Sustained.

By Mr. Snyder: Exception.

Q. I asked you, did I not, whether the street railway company placed the curbs as provided in the plats?

A. It did.

Q. It complied with its obligations?

A. Yes.

By Mr. Snyder: That is admitted, isn't it?

By Judge Ames: Yes, we will admit it. Mr. Shartel so testified anyhow.

Q. The space between the tracks isn't paved out there from 16th Street?

A. Well, no part of this——

Q. No part of this private right of way where the railway tracks are situated, is paved?

A. No part of the private right of way where the railway tracks are or the curbing along the street railway, is paved, except at the intersection of a few streets.

Q. And was the Oklahoma Railway Company ever ordered by the city council to make any paving between its tracks or outside of. tracks?

A. No.

Q. No order or notice of any kind was served on you to do that?

241 A. No order or notice of any kind was ever served on us in this matter.

Q. And the private right of way is within the street all along from 10th to 16th?

A. It is the center line of the street clear through.

Q. And this private right of way that you have described and referred to, is the only property of the Oklahoma Railway Company anywhere in that vicinity, is it not?

A. No; we have got a lot of other—right of way—in that vicinity.

Q. I mean in that district—in that paving district out there?

A. That is a hard question to answer. We have got a number of cross streets intersecting this, with private right of way running through them. For instance, Pennsylvania Avenue has a private right of way in it 33 feet wide, running from the corner of Linwood, where it turns on what would be 13th Street, north to 16th street. It also has a private right of way running north and south on Young Boulevard, north to 19th Street, that is occupied by an intersecting street railway track, and south from Young Boulevard a quarter of a mile beyond, occupied by track. Then, intersecting this is Miller Boulevard. In the center of the Miller Addition, running north and south is a 50-foot private right of way running from 10th to 16th Street.

Q. Does it own any lots or blocks out in that immediate district?

A. With the exception of the right of way, nothing.

Q. And your contention is that this is not a lot or block within the meaning of the statute?

242 A. That has been my view of it. If I am mistaken there will be some track to tear up.

Q. That calls to mind another question. You say that line out there has persistently lost money from the time it was first constructed?

A. It has.

Q. If the right of way should be subject to assessment, and should be assessed as for benefits, for the cost of making this improvement, as has been attempted, or anything like the sum that has been named in the petition as having been assessed against it, what would be the effect?

By Judge Ames: That is objected to as immaterial.

By the Court: Sustained.

By Mr. Snyder: Exception.

By Mr. Snyder: The witness would answer, if permitted, that an assessment of anything like the amount that is named in the petition of the plaintiff as having already been levied against it on account of this right of way,—or against the right of way itself—would necessitate the railway company discontinuing the use of the line and letting the property go for taxes or for non-payment of the taxes of the special assessment; that the company could not afford to oper-

ate the line, and that the line would not be worth sufficient to the system to be operated with that charge against it. We offer to show that.

By Judge Ames: We object to it as immaterial.

By the Court: Sustained.

By Mr. Snyder: Exceptions.

243 Q. Mr. Shartel, except for the insertion in the plats, shown by the Exhibits A to F, inclusive, and the return of the Oklahoma Railway Company to the alternative writ in this case, respecting the obligation of paving, would the Oklahoma Railway Company of the Oklahoma City and Suburban Railway have ever built a line of railway into this district?

A. It would not.

Q. Did you, prior to the time of the making of this improvement there, ever have any talk with Mr. Severns, or with any representative of the plaintiff company, about the paving out there?

By Mr. Ames: That is objected to as immaterial. There wasn't any issue raised by the pleadings and I don't know what it is.

By the Court: Is that an issue here?

By Mr. Snyder: I want to bring hime to them the knowledge of the limitations in these plats.

By the Court: Don't they take notice of the plats?

By Mr. Snyder: I understand, but I want to bring specific notice to them. It may not be material, but I would rather show it.

By the Court: Are you pleading that they are estopped from contesting this?

By Mr. Snyder: Well, I would like to ask permission of the Court to amend, at this time, to set up a plea of estoppel. A plea of estoppel does exist, but I would like to be given leave to amend so as to make this appear: That prior to the time of making the assessment, that the attention of the plaintiff was called to the provision of the plat respecting the obligation of the railway Company con-

244 cerning the paving, and the limits there, and furthermore, that prior to the time that the assessing ordinance was finally made, that counsel for the paving company, at that time, or that the then counsel for the paving company had his attention called to the fact, and was asked not to proceed, as is alleged in the petition for the alternative writ and in the alternative writ; they did proceed, and that by reason of these things they are estopped now to ask for the relief which they do ask.

By the Court: The defendant will be given leave to make the amendment, and the amendment, as tendered, will be considered as made.

Q. Now, Mr. Shartel, did you, prior to the making of this assessment, have any communication with any official of the plaintiff company respecting the matter that has been indicated in this amendment?

A. I had a conversation about this paving before it was done; before the work of paving was done.

Col. Johnson: Do you mean before it was begun, or before it was completed?

A. Before it was commenced, or about the time it was commenced. I am not sure which representative of the company I had it with; my recollection is it was with Mr. Severns or Mr. Derr. It came up about their wanting to do our curbing, and they claimed that as a part of their contract with the city. I had let a contract for that work to the Western Paving Company. In that conversation, I can't remember the language, but the substance of it was that
245 I explained our attitude,—that the curbing of our right of way was no part of their contract, and that we were standing pat under our plat provision, and that we then had the identical matter in litigation in the United States Court.

Q. You explained to him what the provisions of the plats were?

A. I don't know that I went into details; my recollection is that the matter was discussed quite fully.

Q. You told him, substantially, that you were claiming that the railway company wasn't to bear any part of the cost of paving; that its sole obligation was to pave the street intersections and curb its right of way?

A. I don't think we went into the details that far, because the matter was a matter of public not-riety at that time, and I assumed they knew what was going on. I gave them to understand that we were standing on our rights there.

Q. You had the Western Paving Company to do this work?

A. The Western Paving Company did the curbing from 10th street to the end of the line; yes.

By Mr. Snyder: Mr. Ames, you admit the conveyance from the Oklahoma City and Suburban to the Oklahoma Railway Company?

By Judge Ames: Yes, we admit that.

By Mr. Shartel: The date of the conveyance,—it was filed for record the 10th of April, 1911. I have the original deed here.

By Mr. Snyder: We will furnish a copy of this deed for the record without putting it in the record.

By Mr. Shartel: The deed is also dated and acknowledged on the same date,—the 10th of April, 1911.

By Judge Ames: That is conveying this right of way?

246 By Mr. Shartel: That conveys the right of way from May Avenue to Grand Boulevard.

By Mr. Snyder: The right of way out to May Avenue was owned by the Oklahoma Railway Company at all times?

By Mr. Shartel: Yes.

By Mr. Snyder: It is stipulated and agreed that these plats and dedications were made and filed at a time when the land embraced in the plats was not a part of the city limits, and that by ordinance the property was duly, thereafter, annexed to the city.

Q. Who put in the street intersections there where they were paved?

A. My understanding is there are only two paved intersections in this district; one is on 16th Street.

Q. And the other is Pennsylvania, isn't it?

A. Now, there may be one on west 13th street; I wouldn't be sure about that; and I think there is one on Pennsylvania. The 16th street intersection, my recollection is, was paved as a part of the 16th Street paving.

Q. That is, 16th Street is paving east and west across Linwood?

A. 16th Street was paving east and west, prior to the paving of Linwood Boulevard. I think that intersection was put in as a part of that 16th Street paving. I think I remember fixing up our crossing there so as to enable the traffic to get over our tracks to the west side. The Oklahoma Railway paid for the paving of the Pennsylvania Avenue intersection, and if there is a paved intersection on West 13th Street I can't testify, personally, as to who did it, or who paid for it, or anything about it. My recollection is there are a number of plank crossings there, where the company has put
247 in plank crossings. That is done on nearly all streets where there is any travel; some there is no travel and I don't think they have been fixed up at all.

Q. But where these plats provide that the company shall pave at intersecting crossings, where intersecting streets are paved, the company has done it?

A. That is my understanding; so far as I know of we have.

That is all.

Cross-examination by Judge Ames:

Q. I wish you would describe the curbing that the company placed on each side of its right of way.

A. It is down, unless it is necessary to go deeper for foundation,—I think it runs about eighteen inches underground and from four to six inches above the street surface. It is about six inches thick and is made of concrete with a cement finish on the surface.

Q. Now, beyond the intersection of 16th and Linwood——

A. Before leaving the curbing,—at the ends where the street crossings are left, the curbing curves around on a quarter circle and comes around on the right of way; and that curbing commences at 10th street and follows the street to its end, about fifty feet away from Grand Boulevard, at the end of the paving.

Q. Going beyond the intersection of 16th?

A. Yes.

Q. With reference to the houses out in that vicinity: there are a number of houses built out beyond the intersection of Linwood Boulevard and 16th, aren't there; some expensive, high-class residences out there?

248 A. I think there are fourteen or fifteen houses in what is known as Linwood Addition, mostly north of Linwood Boulevard and within the last half mile of this course; and some very good houses. The class of improvements there is good.

Q. There is a schoolhouse about two or three blocks west of the intersection of Linwood and 16th, isn't there?

A. Yes.

Q. There is another schoolhouse at some point in the neighborhood of Pennsylvania Avenue and 15th Street, isn't there?

A. That is two blocks north of Linwood Boulevard and Young's Boulevard. I believe it is between 14th and 15th Streets.

Q. Did the railway company receive any bonus for the construction of this line from 10th on through Linwood Boulevard?

A. From 10th street to Villa Avenue, the first ¾ of a mile, it received nothing, except the right of way. From Villa Avenue to May Avenue it was promised three or four blocks, and it traded its interest in them off without receiving the blocks themselves. From May Avenue to 16th street it received nothing but the right of way. Do you want to go on through the line?

Q. Yes, just go on.

A. From 16th street north it was promised $20,000.00, which it has never received, and which has been charged off as worthless, in addition to the right of way.

That is all.

By Mr. Shartel: I will just say, in addition to the question
249 that you asked, that the lots and blocks received in the Miller Addition were exchanged with Mr. Classen for the purchase of some private right of way in Southtown. That, with a lot of other scattering lots and blocks—I think five or six blocks in Las Vegas Addition—was in the deal, and were exchanged for a half mile of private right of way, or six thousand feet of private right of way in Schilling's Addition, for which Mr. Classen paid $10,000 for. The actual value received in the way of bonus on the entire line would not exceed five thousand dollars.

Recross-examination by Judge Ames:

Q. Is Mr. Classen an officer of the Oklahoma Railway Company?

A. He was.

Q. A stockholder?

A. He was.

Q. Did he own the controlling interest in the stock?

A. He did.

Q. Was he also the owner of the principal stock of the private stock of the Classen Company?

By Mr. Snyder: Objected to as immaterial

By the Court: Overruled.

By Mr. Snyder: Exception.

A. Why, I have understood so; I haven't any actual personal knowledge.

Q. Do you know whether Mr. Classen or the Classen Company own any real estate in proximity to this line of street railway, ex-

tending from 10th and Linwood on through to Linwood and Grand Boulevard?

250 By Mr. Snyder: Objected to as incompetent, irrelevant and immaterial.

(No ruling.)

A. At what time?

Q. At any time the line was built?

A. The Classen Company bought about forth acres just west of May Avenue, previous to the building of this line, to enable us to get that right of way through. On the exchange of the lots and blocks in Miller Boulevard Addition for other right of way in another part of town, it represented all the real estate they owned in proximity to this line—that is, the company. Mr. Classen, after the building of the original line through Young Addition, acquired a half interest in that addition. I am not sure, Mr. Ames, whether these blocks in Miller's Boulevard Addition, that I traded to him for other right of way, was made after the line was built or about the time or before. I made all of those real estate contracts.

Q. I just wanted to know the value——

A. I thought I made a very good trade for the company in making that turn, and the sequen proved that we did.

By Mr. Snyder: Now we move to strike all of this out, as to the location of that property, as not within the issues of this case, incompetent, and not proper cross-examination.

By the Court: I think that it perhaps would not be competent if evidence had not been introduced relative to transfers of property which was received here in consideration of the extending of this line, which had been traded to another company referred to in the questions as propounded by counsel here, or testified to,
251 rather, as being property in which Mr. Classen was interested largely. The motion is overruled.

By Mr. Snyder: Exception.

That is all.

Witness excused.

By Mr. Snyder: It is admitted that Exhibit B to the supplemental return to the alternative writ of mandamus is a true and correct copy of the amended bill of complaint in the action in which it purports to have been filed; and that the final decree, shown as Exhibit A to said supplemental return to the alternative writ of mandamus, is a true and correct copy of the final decree in the case in which it appears to—in which it purports to have been filed, and that the City of Oklahoma City, and the officers of the city, were parties to the suit in the United States District Court.

By Mr. Snyder: We offer Defendant's Exhibit 1 in evidence.

By Judge Ames: Objected to for the reason that it is incompetent, irrelevant and immaterial.

By the Court: Overruled.

By Judge Ames: Exception.

Defendant's Exhibit 1, above referred to, offered and admitted in evidence, is the supplemental return of the defendant to the alternative writ of mandamus, herein, and is heretofore set out in this case-made and made a part hereof.

By Mr. Snyder: Now, do you admit that this final decree has never been appealed from?

By Judge Ames: Yes, sir; we will admit that.

252 HENRY G. SNYDER, being called as a witness in behalf of the defendant, testified as follows, after having been first duly sworn:

Direct examination by Mr. Asp:

Q. State your name.
A. Henry G. Snyder.
Q. Where do you live?
A. Oklahoma City.
Q. What is your occupation?
A. I am a member of the Bar.
Q. You are one of the attorneys for the Oklahoma Railway Company?
A. I am.
Q. In this proceeding?
A. I am.
Q. Do you know when these proceedings were instituted?
A. In this case?
Q. No, I mean the paving proceedings?
A. Oh, in the latter part of 1910.
Q. During the time when these proceedings were being had by the City Council and the appraisers, did you have any conversation with counsel for the paving company in regard to this matter and the method of assessments, as effected by these proceedings?
A. Yes, I will state just what I said——
Q. I just asked you if you did. If you did, go ahead and tell it.
A. Well, not exactly in the way in which you put the question. I did during the progress of the litigation in the Federal
253 Court, relating to paving, including both street surface paving and assessments for private right of way paving; and before the opinion was handed down by Judge Pollock, in that case, in the Federal Court, Mr. Crockett, of the firm of Burwell, Crockett & Johnson, called me one day, and he said he understood I had a brief in which was considered the question of the proper method of assessing a railway company—street railway company—who had a private right of way through a street, or words to that effect, and I told him I had, and he asked me to see it, and I let him have it, and I told him I hoped they wouldn't make the same mistake that the other people had made, and that I thought, from the brief, that he would be convinced that there was a proper method of proceeding, and that he would follow that method and assess the private property owners;

and he took the brief, and I finally got it back from him before this assessment was made. And he told me that after he had read that brief he was more convinced than ever, that the procedure which he proposed to follow, and was following, was correct.

Q. Was that, now, the procedure in relation to——

A. That was the procedure that he did follow in making this assessment.

Q. He was preparing and supervising the procedure involved in this litigation?

A. Yes, sir; and I tried to get him not to do it; I tried to get him to see the proper way of making the assessment.

That is all.

254 By the Court: Have you got a motion pending here to retax the cost or tax the cost against him because of the errors that you think he made?

By Mr. Snyder: Not yet; the Court hasn't ruled against us.

By the Court: Well, in the other case?

By Mr. Snyder: No, I wasn't in that other case; the Oklahoma Railway Company wasn't a party to that other case.

By Judge Ames: I move to strike out that conversation as immaterial.

By the Court: I don't see how it can throw any light here.

Cross-examination by Judge Ames:

Q. When was the conversation you had with Mr. Corckett, with reference to the time the work was done?

A. I can't say, Mr. Ames; I think it was after, though. I know this much, it was after the contract had been let but before the assessment. And the question was first about how the assessment was to be made, and he told me that was the question he had in mind that he was trying to solve.

By Mr. Asp:

Q. Including the proceedings of the appraisers to apportion the benefits?

A. And I told just as near as I could what he told me; I didn't examine his proceedings or anything of that kind; I just tried to persuade him to do it the other way, and he told me, after he read my brief, that he was more convinced than ever.

255 By Judge Ames: We renew the motion to strike out the conversation.

By the Court: Sustained.

By Mr. Asp: Exception.

That is all.

Witness excused.

Defendant rests.

Plaintiff rests.

Taking of Testimony and Evidence closed.

The above and foregoing is and was all of the evidence introduced in the trial of the cause Numbered 13793, and entitled Severns Paving Company vs. Oklahoma Railway Company, et al., in the District Court of Oklahoma County, Oklahoma, on the 20th day of February, 1914, by both plaintiff and defendants, before the Honorable Geo. W. Clark, Judge.

256 Plaintiff's Exhibit A-13794, the exhibit above referred to, offered and admitted in evidence over the objection and exceptions of defendant, Oklahoma Railway Company, is in words and figures as follows, to-wit:

Abstract for the Paving of Linwood Blvd. from the Center of 16th St. to E. Line of Grand Blvd., Oklahoma City, Oklahoma. (*The Severns Paving Co., Contractors.*)

257 (Council Journal, #15, Page 152.)

OKLAHOMA CITY, OKLA. Oct. 11, '10.

Council met in Regular Session at 10 o'clock A. M. with the Mayor and following members present: Messrs. Upshaw, Taylor, Ruth, Corder, Peshek, Johnson, Lillard, Lackey, Byers, Vance, Carroll, Smith, Cook, Donnelly and R. Z. Taylor.

Resolution was read to pave Linwood Blvd. from the center line of 16th street to the E. line of Grand Blvd. in Oklahoma City, Oklahoma.

Moved by Mr. Donnelly, seconded by Mr. Lackey that the Resolution be adopted as read and ordered published according to law. Motion carried by unanimous roll call vote.

258 (Published Oct. 14 to 20th, Inc., 1910.)

Paving Resolution No. 136.

A Resolution to Pave Certain Streets, Avenues and Boulevards.

Be it Resolved by the Mayor and City Council of the City of Oklahoma City, Oklahoma:

First. That it is necessary to pave the following streets, avenues and boulevards in the City of Oklahoma City, Oklahoma, to-wit:

30th Street from the west line of Walker Ave. to the east line of Shartel Ave. and Lee Avenue from the north line of 30th Street to the south line of 36th St.

Linwood Boulevard from the west line of Western Avenue to the center line of 10th Street.

Linwood Boulevard from the center line of 10th Street to the center line of 16th Street.

Linwood Boulevard from the center line of 16th Street to the east line of Grand Boulevard.

16th, 17th and 18th Streets from the west line of Linwood Boulevard to the east line of Independence Avenue; 20th and 21st Streets from the west line of Drexel Boulevard to the east line of Independence Avenue, Drexel Boulevard from the north line of Linwood Boulevard to the north line of 21st Street, Land Avenue from the north line of 16th Street to the South line of 21st Street; Independence Avenue from the south line of 17th Street to the north line of 21st Street.

Young Boulevard from the north line of Linwood Boulevard to the south line of 16th Street, and to do necessary grading, to construct manholes and catch basins, to put inlet pipes, lateral storm sewers, curbs, therefor.

259 Second. That, if the owners of more than one-half (½) in area of the lots and tracts of land liable to assessment for the cost of these improvements, which assessment shall include the cost of improving the street and alley o- intersections, shall not, within fifteen (15) days after the last publication of this resolution, file with the City Clerk their protest in writing against such improvement, such protest or objection to be made as to each of the above named streets, avenues and boulevards, separately, then the Mayor and City Council shall cause such improvements to be made and contracted for at the expense of said lots and tracts of land, as provided for in House Bill No. 231, of the Legislature of the State of Oklahoma and House Bill No. 401 being an amendment thereto.

Third. That this resolution shall be published in six (6) consecutive issues of the "The Daily Oklahoman," a daily newspaper published and of general circulation in said city.

Approved and adopted this 11 day of October, 1910.

HENRY M. SCALES,
Mayor.

Attest:
BOB PARMAN,
[SEAL.] *City Clerk.*

260 *Affidavit of Publication.*

STATE OF OKLAHOMA,
Oklahoma County, ss:

E. K. Gaylord of lawful age being first duly sworn upon oath, deposes and says; That he is one of the publishers of The Daily Oklahoman, a newspaper of general circulation, printed and published at Oklahoma City, in said County and State of Oklahoma; and that the Notice of Publication, a copy of which is hereto annexed, was published in the daily edition of said paper, six consecutive issues the first publication being on the 14th day of Oct., 1910, and the last upon the 20th day of Oct., 1910.

E. K. GAYLORD.

Subscribed and sworn to before me this sixth day of June, 1911.

R. A. PARMAN,
Notary Pub.

My commission expires Aug. 21, 1912.

261 OKLAHOMA CITY,
Oklahoma County, ss:

I, Bob Parman, the duly qualified and acting City Clerk of the City of Oklahoma City, do hereby certify that the above and foregoing is a true and correct copy of Paving Resolution No. 136, which was duly passed by the City Council on Oct. 11, 1910 and approved by the Mayor Oct. 11, 1910 and duly published Oct. 14 to 20th inc., 1910.

BOB PARMAN,
City Clerk.

262 OKLAHOMA CITY, OKLAHOMA, Oct. 18, 1910.

Council met in Regular Session at 10 o'clock A. M. with the Mayor and following members present: Messrs. Upshaw, Taylor, Ruth, Corder, Peshek, Johnson, Lillard, Lackey, Vance, Dancy, Carrol, Smith, Donnelly and R. Z. Taylor. Absent: Messrs. Byers and Cook.

The resignation of Henry M. Scales, as Mayor of the City of Oklahoma City, Oklahoma, to take effect at once, was read.

Moved by Mr. Upshaw, seconded by Mr. W. E. Taylor, that the resignation be laid upon the table and the Mayor granted a leave of absence for sixty days. Moved by Mr. Lillard, seconded by Mr. Vance, as a substitute for Mr. Upshaw's motion, that the resignation be accepted as tendered. The substitute motion carried by the following roll call vote: Ayes—Messrs. Ruth, Johnson, Lillard, Lackey, Vance, Dancy, Carroll, Smith, Donnelley, and R. Z. Taylor. Nayes—Messrs. Upshaw, Taylor, Corder and Peshek.

STATE OF OKLAHOMA,
County of Oklahoma, ss:

I, Bob Parman, the duly qualified and acting city clerk of the City of Oklahoma City, hereby certify that the above and foregoing is a true and correct copy of the council proceedings in reference to the resignation of Henry M. Scales as Mayor of the City of Oklahoma City.

Dated January 7, 1911. BOB PARMAN,
City Clerk.

263 (Council Journal, #15, Page 566.)

OKLAHOMA CITY, OKLA., Apr. 25, '11.

Council met in Regular Session at 10 o'clock A. M. There being no quorum present and Mayor Scales having resigned, Dan V. Lackey, President of Council and acting Mayor, adjourned the meeting to meet April 26, 1911 at 10 o'clock A. M.

(Council Journal, #15, Page 577.)

OKLAHOMA CITY, OKLA., Apr. 26, '11.

Council met in adjourned session at 10 o'clock A. M. Mayor Scales having resigned Dan V. Lackey, President of Council and

Acting Mayor, presided with the following members present: Messrs. Upshaw, Taylor, Ruth, Corder, Johnson, Lillard, Byers Dancy, Carrol, Smith, Cook, Donnelley and R. Z. Taylor, Absent: Messrs. Peshek and Vance.

Approval Resolution was read to Pave Linwood Blvd. from the center line of 16th St. to the E. line of Grand Blvd., in Oklahoma City, Oklahoma.

Moved by Mr. R. Z. Taylor, seconded by Mr. Donnelly that the Resolution be adopted as read. Motion carried by unanimous roll call vote. City Engineer Burke submitted plains, profiles, estimate and specifications for the Paving of the Streets as described in the foregoing Resolution.

Moved by Mr. Donnelly, seconded by Mr. Ruth that the plains, specifications, etc. be adopted. Motion carried by unanimous roll call vote.

264 *A Resolution of the Mayor and City Council of the City of Oklahoma City, Oklahoma.*

Be it Resolved by the Mayor and City Council of the City of Oklahoma City, Oklahoma:

That whereas, a resolution has been passed by the said Mayor and City Council, and regularly published in six (6) consecutive issues of the official paper of said city, providing for certain improvements to be made on certain boulevards as hereinafter described.

And whereas, the time for objection or protest on the part of the property owners has expired, and not sufficient protests or objections have been filed and that all of the proceedings have been regular and in due form, as provided by law, and the said Mayor and City Council having determined to proceed with such improvements in accordance with such resolution:

Be it therefore resolved that Linwood Boulevard from the center line of 10th Street to the center line of 16th Street be paved with a double drive way each to be twenty (20) feet in width from face of curb to face curb and Linwood Boulevard from the center line of 16th Street to the east line of Grand Boulevard be paved with a double droveway each to be twenty (20) feet in width from face of curb to face of curb, in the City of Oklahoma City, Oklahoma, and the surface material to be used in paving the roadway of said boulevards shall be two inches (2) of Asphaltic Concrete, composed of a sand bearing gravel and Bermudez Asphaltic Cement, with a five (5) inch Portland Cement Concrete foundation, and that the necessary grading and other work be done in the preparation of the surface of the boulevards to receive such pavement, and that catch basins and manholes be constructed therefor and of standard
265 sizes and dimensions including the installation of the necessary iron castings and covers, and that a concrete curb be constructed therefor in accordance with the standard specifications of said city, such curbing to be (6) inches in thickness at the top, eight (8) inches thick at the bottom and twenty-four (24) inches

in depth, and that such drainage as is necessary be constructed therefor to adequately and sufficiently drain the surface water from such pavement and the drain pipe to be used in sych drainage shall be of the size and thickness as, in the judgment of the City Engineer is necessary, and all of the material used in the paving of said boulevards shall be equal to the provision of the standard specifications for street paving. The specifications to be provided shall permit the use of gravel in the concrete base to the amount of two-thirds of the mineral aggregate and that the City Engineer of said city be, and hereby is, authorized and directed to prepare plains, plats, profiles, estimates and specifications for such construction.

Be it further resolved that all of -he work done and material furnished shall be in strict accordance with the plans and specifications of the City Engine-r and of -he proper quality and tests. That the Contractor, to whom a contract shall be awarded for the construction of such improvements, shall execute to the City a good and sufficient bond, in a sum equal to twenty (20) per cent of the contract price, conditioned for the faithful performance of the work and execution of the contract and for the protection of said city and all property owners against any and all loss or damage, caused by reason of neglect or improper execution of the
266 work, and the said contractor shall also execute a good and sufficient bond in the sum of ten (10) per cent of the contract price, conditioned for the maintenance of said work in a state of good repair for a period of not less than five (5) years from the date of the completion and acceptance of the said work.

Be it further resolved that the City Clerk of said City, be and he hereby is, authorized to direct the advertisement for bids for furnishing and delivering the material and performing the work necessary for the improvement of said voulevards in the manner provided by law, each bid is to be accompanied by a certified check in the amount of 3% of the amount of the bid, same to be forfeited to the City in case the successful bidder fails to enter into contract and to give the required bond within the required time.

Passed by the Council thes 26th day of Apr. 1911.
Approved by the Mayor this 26th day of Apr. 1911.

DAN V. LACKEY,
Pres. of Council and Acting Mayor.

Attest:
BOB PARMAN,
City Clerk.
[SEAL.]

267 April 26, 1911.

To the Honorable Mayor and City Council, City.

GENTLEMEN: Herewith, I submit preliminary estimate for the paving of Linwood Blvd. from the center of 16th Street, to the east line of Grand Boulevard.

Estimate.

Asphalt macadam paving, ..	19080	sq. yds.	@ $2.25	$42930.00
Earth excavation, ...	12320	cu. yds.	@ .35	4312.00
Rock Excavation, ...	200	" "	@ .70	140.00
Curbing, single, ...	8050	lin. ft.	@ .65	5232.50
3" Oak headers, ...	350	"	@ .15	52.50
10" Vit. pipe, ...	745	"	@ .60	447.00
12" " "	895	"	@ .80	716.00
15" " "	670	"	@ 1.00	670.00
18" " "	1475	"	@ 1.55	2286.25
24" " "	455	"	@ 2.30	1046.50
30" Concrete sewer, ...	735	"	@ 2.50	1837.50
10" X 12" Breeches, ...	2		@ 1.75	3.50
Manholes, ...	8		@ 40.00	320.00
Catch Basins, ...	25		@ 20.00	500.00
10" X 18" Breeches, ...	1		@ 2.70	2.70
Total, ...				$60496.45
Engineering, 2½%, ...				1512.41
Printing & appraising, ...				405.00
Total cost, ...				$62413.86

Respectfully submitted,

W. C. BURKE,
City Engineer.

268 *Affidavit of Publication.*

STATE OF OKLAHOMA,
Oklahoma County, ss:

E. K. Gaylord of lawful age being duly sworn upon oath, deposes and says: That he in one of the publishers of "The Daily Oklahoman", a newspaper of general circulation, printed and published at Oklahoma City, in said County and State of Oklahoma; and that the Notice of Publication, a copy of which is hereto annexed, was published in the daily edition of said paper ten consecutive issues, the first publication being on the 27th day of April, 1911, and the last upon the 8th day of May, 1911.

E. K. GAYLORD.

Subscribed and sworn to before me this 6th day of June, 1911.

R. A. PARMAN,
Notary Pub.

My commission expires August 21, 1912.

269 (Published April 27, 1911 to May 8, 1911, inc.)

Notice to Paving Contractors.

Under the direction and by the authority of the Mayor and City Council of the City of Oklahoma City, sealed bids will be received

at the office of Bob Parman, City Clerk, up to 5 o'clock P. M., May 8, 1911, and will be considered by the Mayor and Council in the Council Chamber in the City Hall Building, at 10 o'clock A. M., May 9, 1911, for the paving with 2-inch asphaltic concrete, composed of a sand bearing gravel and Bermudez Asphaltic Cement, with five (5) inch Portland Cement Concrete foundation, and the doing of the necessary grading and such other work as may be necessary of Linwood Boulevard from the center line of 10th street, to the center line of 16th Street, be paved with a double drive way each to be twenty (20) feet in width from face of curb to face of curb, in the City of Oklahoma City, Oklahoma.

All the necessary work, such as paving, grading, concrete curbing and guttering, oak header and all other work, shall be in accordance with the plans and specifications now on file in the office of the City Clerk. Each bid must be accompanied by Certified Check in the sum of three (3) per cent. of the amount bid, payable to Bob Parman, City Clerk, to be forfeited to the city in case the successful bidder fails to enter into a contract and give the required bond in the required time. Contractors will be required to give bond in the sum of twenty (20) per cent. of the contract price for the faithfulness to performance of said work and holding of the city
270 harmless from any and all damages which might occur. Contractors will be required to give a bond in the sum of ten (10) per cent. of the contract price for the keeping of the paving in a state of good repair for a period of not less than five (5) years. The contractor shall receive for the above work street improvement bonds at par value against the abutting property, according to House Bill No. 231, of the State of Oklahoma, dated April 17th, 1908.

Council reserves the right to reject any and all bids.

[SEAL.] BOB PARMAN,
City Clerk.

271 (Council Journal No. 15, Page 598.)

OKLAHOMA CITY, OKLA., May 9, '11.

Council met in Regular Session at 10 o'clock A. M. There being no quorum present and Mayor Scales having resigned, Dan V. Lackey, President of Council and Acting Mayor, adjourned the meeting to meet May 9, 1911, at 3 o'clock P. M.

(Council Journal No. 15, Pages 599 and 610.)

OKLAHOMA CITY, OKLA., May 9, '11.

Council met in Adjourned Session at 3 o'clock P. M. Mayor Scales having resigned, Dan V. Lackey, President of Council and Acting Mayor, presided with the following members present: Messrs. Upshaw, Taylor, Ruth, Corder, Peshek, Johnson, Lillard, Carrol, Smith, Cook, Donnelly, and R. Z. Taylor. Absent: *Messrs.* Mr. Vance.

Moved by Mr. Upshaw, seconded by Mr. Donnelly, that Council adjourn to meet May 10th, 1911, at 3 o'clock P. M. Motion carried.

(Council Journal No. 15, Page 611.)

OKLAHOMA CITY, OKLA., May 10, '11.

Council met in Adjourned Session at 3 o'clock P. M. There being no quorum present and Mayor Scales having resigned, Dan V. Lackey, President of Council and Acting Mayor, adjourned the meeting to meet May 11, 1911, at 10 o'clock A. M.

(Council Journal No. 15, Page 612.)

OKLAHOMA CITY, OKLA., May 11, '11.

Council met in Adjourned Session at 10 o'clock A. M. Mayor Scales having resigned, Dan V. Lackey, President of Council and Acting Mayor, presided, with the following members present:
272 Messrs. Upshaw, Taylor, Ruth, Corder, Peshak, Johnson, Lillard, Byers, Dancy, Carrol, and R. Z. Taylor. Mr. Smith came later. Absent: Messrs. Vance, Cook and Donnelly.

Resignation of Mr. F. T. Cook was read, resigning as a member of the City Council from the Seventh Ward, in Oklahoma City, Oklahoma. Moved by Mr. Ruth, seconded by Mr. Upshaw, that the resignation be accepted. Motion carried.

Mr. Dancy nominated E. C. Ross and Mr. Lillard nominated Jas. R. Lewis to be appointed as Councilmen from the Seventh Ward of Oklahoma City, Oklahoma, to fill the vacancy caused by the resignation of F. T. Cook. Mr. Jas. R. Lewis was elected by the following roll call vote: Those voting for Mr. Jas. R. Lewis were Messrs. Upshaw, Taylor, Ruth, Peshek, Lillard, Byers and R. Z. Taylor. Those voting for Mr. E. C. Ross were as follows: Messrs. Corder, Johnson, Dancy and Carroll. Moved by Mr. Lillard, seconded by Mr. Ruth, that the appointment of Mr. Jas. R. Lewis be unanimously confirmed. Motion carried. Whereupon, the Mayor administered the oath of office to Jas. R. Lewis as Councilman from the Seventh Ward of Oklahoma City, Oklahoma.

273 (Council Journal # 15, Page 598.)

OKLAHOMA CITY, OKLA., May 9, 1911.

Council met in Regular Session at 10 o'clock A. M. Mayor Scales having resigned, Dan V. Lackey, President of Council and Acting Mayor, adjourned the meeting to meet May 9, 1911, at 3 o'clock P. M.

(Page 610.)

OKLAHOMA CITY, OKLA., May 9, '11.

Council met in adjourned session at 3 o'clock P. M. Mayor Scales having resigned, Dan V. Lackey, President of Council and Acting

Mayor, presided, with the following members present: Messrs. Upshaw, Taylor, Ruth, Corder, Peshek, Johnson, Lillard, Carroll, Smith, Cook, Donnelly and R. Z. Taylor. Absent: Mr. Vance.

Bids were opened and read for the paving of certain streets, as per advertisement for bids closing at 5 o'clock P. M. May 8, 1911. Moved by Mr. Peshek, seconded by Mr. Donnelly, that the bids be referred to the Paving Committee and City Engineer for a report. Motion carried.

274 (Council Journal No. 15, Page 634.)

OKLAHOMA CITY, OKLA., May 23, '11.

Council met in Regular Session at 10 o'clock A. M. Mayor Scales having resigned, Dan V. Lackey, President of Council and Acting Mayor, presided, with the following members present: Messrs. Upshaw, Taylor, Ruth, Corder, Peshek, Johnson, Lillard, Dancy, Carroll, Smith, Lewis, Donnelly and R. Z. Taylor. Absent: Messrs. Byer and Vance.

The Paving Committee and City Engineer reported that the bid of The Severns Paving Co. was the lowest and best for the paving of Linwood Blvd. from the center line of 16th street to the east line of Grand Blvd., in Oklahoma City, Oklahoma, and recommended that they be awarded the contract for this work.

Bids were as follows:

Western Paving Co., Approximate Total..... $62,248.84

The bid of the Severns Paving Co. was as follows:

Approximate Total $59,951.71

	5-yr. guar.
Asp. Macadam Paving, inc. 5" Portland Cem. Con. Foundation, per sq. yd.....	$2.17
Earth Excavation, per cu. yd.....	.35
Rock Excavation, " " "	.35
Con. Curbing, 6", " lin. ft.....	.55
3" Oak Header, inc. posts, per lin. ft.....	.15
Vit. Pipe in place, inc. backfill, 10" lin. ft.....	.50
" " " " " " 12" "	.80
" " " " " " 15" "	1.00
" " " " " " 18" "	1.55
" " " " " " 24" "	2.30

275

Cement Pipe in place, inc. backfill, 30" lin. ft.....	$2.50
Circ. Monolithic in place, inc. " 30" "	2.50
10 x 12 breeches.....	1.75
10 x 18 "	2.00
Manholes, comp. each.....	40.00
Catch basins or sew. Inlets, comp. with cast each.....	20.00

Moved by Mr. Upshaw, seconded by Mr. W. E. Taylor, that the port be concurred in and the contract awarded to the Severns Paving Co. for this work. Motion carried by unanimous vote.

6 (Council Journal #15, Page 638.)

OKLAHOMA CITY, OKLAHOMA, May 30, 1911.

Council met in Regular Session at 10 o'clock A. M. There being quorum present, and Mayor Scales having resigned, Dan V. ckey, President of Council and Acting Mayor, adjourned the eting to meet May 31, '11, at 10 o'clock A. M.

(Pages 639 & 644.)

OKLAHOMA CITY, OKLA., May 31, '11.

Council met in adjourned session at 10 o'clock A. M. Mayor ales having resigned, Dan V. Lackey, President of Council and ting Mayor, presided, with the following members present: ssrs. Upshaw, Taylor, Ruth, Corder, Johnson, Lillard, Vance, aith, Lewis, Donnelly, and R. Z. Taylor. Mr. Peshek came in er. Absent: Messrs. Byers and Carroll.

Moved by Mr. Upshaw, seconded by Mr. W. E. Taylor, that Coun- reconsider action taken at a meeting of May 23, 1911, in requir- the Severns Paving Co. to commence work within 20 days and ish within 120 days after the signing of the contract for the pav- of certain portions of Linwood Blvd., for which they were arded a contract. Motion carried by unanimous vote. Moved Mr. R. Z. Taylor, seconded by Mr. Upshaw, that the Severns ving Co. be required to commence and finish the work on the ing of certain portions of Linwood Blvd. as per their bid. Mo- n carried.

Moved by Mr. Upshaw, seconded by Mr. Ruth, that Council ad- rn to meet June 1, 1911, at 10 A. M., carried.

(Page 646.)

OKLAHOMA CITY, OKLA., June 1, '11.

Council met in adjourned session at 10 o'clock A. M. Mayor ales having resigned, Dan V. Lackey, President of Council and ting Mayor, presided, with the following members present: ssrs. Upshaw, Taylor, Ruth, Corder, Johnson, Lillard, Vance, rroll, Smith, and Donnelly. Absent: Messrs. Peshek, Byers, ney, Lewis and R. Z. Taylor.

The Bond Committee recommended favorable the contract and struction bond of the Severns Paving Company for the Paving Linwood Blvd. from the center line of 16th Street to the E. line Grand Blvd. in Oklahoma City, Oklahoma. Moved by Mr. Don- y, seconded by Mr. Lillard, that the report be concurred in and

bond approved and contract ordered executed. Motion carried by unanimous vote.

278 *Contract.*

This contract made and entered into this 31st day of May, 1911, by and between Severns Paving Company, of Oklahoma City, Oklahoma, a corporation, hereinafter call- The Contractor, party of the first part, and the City of Oklahoma City, Oklahoma, hereinafter called The City, party of the second part.

Witnesseth: That whereas the said contractor is the lowest and the best bidder for making improvements under and by virtue of the provisions of a resolution passed by the City Council of the City of Oklahoma City, Oklahoma, on the 11th. day of October, 1910. Linwood Blvd. from the center line of 16th Street to the east line of Grand Boulevaar, by constructing and guaranteeing for a period of five years, as hereinafter provided, an asphalt pavement on the streets and avenues and the unpaved portions thereof above described, and in the manner provided for in said resolution and the specifications of the City Engineer, approved at the meeting of City Council April 26th, 1911.

Now, therefore, the said Contractor hereby covenants and agrees to furnish all the material and to perform all the work necessary to complete the said improvements according to the terms of said resolution and in conformity to the plans and specifications on file in the City Clerk's office above referred to, to the satisfaction and acceptance of the City Engineer and the City Council of said City; and after the completion and acceptance of the same it shall be maintained and kept in good repair for a period of five years, by the Contractor, at its own expense during said period without further compensation than that provided for in this contract for the first cost of said work, all as provided in the said specifications:

279 The said Contractor agrees to commence work within twenty days from the time this contract is confirmed by the Council of the City, and the work shall be completed to the satisfaction and acceptance of the City Engineer and by the Paving Committee of the City Council of said City within One Hundred and Twenty (120) working days from and after the approval of this contract. Working days shall include all days except only Sundays and legal holidays and such others as are hereinafter excepted.

It is further agreed and understood by the parties hereto that the work herein contemplated shall be commenced at such point of points and prosecuted in such manner and with such force as the City Engineer of the City may direct, and for each working day beyond the time fixed in this contract for the final completion of the improvement, such completion shall be delayed by the Contractor, said Contractor shall pay to the said City the sum of Twenty-five ($25.00) Dollars per day to cover continuing expense of engineer and inspectors.

It is further expressly agreed and understood by and between the

ties hereto that this contract is made subject to the following
ulations and conditions:
. The party of the first part shall do all the work embraced in
s contract so as to conform to the directions of the City Engineer
to the order of time in which the different parts of the work
ll be done, as well as to all his other instructions as to the mode
doing the same, not inconsistent with the specifications.

2. Whenever the Contractor is not present on the work
embraced, orders will be given by the City Engineer to the
Superintendents or Overseers in immediate charge thereof,
l shall by them be received and obeyed; and if any person em-
yed on the work shall refuse or neglect to obey the instructions
the said City Engineer, in any way relating to the work, or shall
pear to the said City Engineer to be incompetent, disorderly or
faithful, he shall, upon the requisition of said City Engineer be
nce discharged and not again employed on any part of the work.
. Any work not herein or in specifications specified which may
fairly implied as included in this contract, of which the City Engi-
r shall be the judge, shall be done by the Contractor without
ra charge beyond the contract prices.
. The working days on this contract lost in consequence of in-
ction or Court proceedings, or bad weather or by grading, or
aching by other contractors, corporations or individuals over
om the party of the first part has not control, or organized general
kes, or the burning of the plant where the material for this con-
t is prepared shall not be held to be working days and shall be
ed to the number of days specified in this contract within which
the work shall be completed.

5. If, in the opinion of the Engineer, the Contractor at
any time during the progress of the work, he may notify the
ntractor by written notice, to employ such additional force as he
ms sufficient; and on the failure of said Contractor to comply
h such notice within three days after its delivery the said City En-
eer may put on such additional force as the cost of the party of
first part; or he may at his option declare such contract annulled,
such declaration must be confirmed and ratified by vote of the
ncil, before having any force of effect; and the power is reserved
he City Engineer to sustain or annul this contract, or to suspend
doing of any work thereunder at any time for any failure on the
t of the Contractor to fulfill the same, or for other good cause;
any action of the City Engineer in suspending or annulling this
ntract or suspending the doing of the work thereunder and his
ision as to the existence of the cause or reason for such annull-
nt or suspension shall be conclusive as to the existence of such
se or reason in any controversy or litigation between the parties
eto or others claiming under them, unless the Contractor shall
eal from such order or action of the Engineer to the Council with-
delay and upon such appeal said Council shall promptly take
and decide the matters in controversy and the decision of the
ntil concerning such matters shall be final unless the Contractor
ll commence legal proceedings within five (5) days from the de-

cision of the Council and if this contract be suspended or annulled the party of the first part shall not be entitled to anything
282 on account of damages thereby occasioned unless it shall appear that such annullment or suspension was without good cause, nor shall such annullment or suspension in any wise affect the right of the city to damages and penalty claimed by it on account of the failure of said contractor, but said abatement or annullment or suspension must be ratified by the City Council before being of any force of effect.

6. The Contractor will be required to observe all city ordinances in relation to obstructing the streets, maintaining the signals, keeping open passageways and protecting the same where exposed, and generally to obey all laws and ordinances controlling or limiting those engaged on the work; and the Contractor hereby expressly agrees to indemnify and save harmless the City of Oklahoma City from all suits and actions, of every nature and description brought against the said city for, or on account of any injury-s or damages received or sustained by any party or parties or by or from the acts of the Contractor or his servants or agents in the performance of their duties in doing the work herein contracted for, or in consequence of any negligence in grading the same, or in any improper materials used in its construction, or by or on account of any acts or ommissions of the said party of the first part, its servants or agents.

7. The party of the first part further agrees that it will pay for the work and labor of all laborers and teamsters, teams and wagons employed on the work and for all material used therein. It is hereby further agreed that the Contractor shall pay engineering,
283 printing, appraisers' and all other fees provided for by the ordinances of said city, in cash at the expiration of each and every month.

8. To prevent all disputes and litigations, it is further agreed by the parties hereto that the City Engineer and Paving Committee shall in all cases determine the amount and quality of the several kinds of work which are to be paid for under this contract; and they shall decide all questions which may arise relative to the execution of the work under his contract, on the part of the Contractor, subject, however, to confirmation by the Council in case of appeal to Council.

9. This contract is entered into subject to the approval or rejection of the Council of the City of Oklahoma City and shall not bind either party until so approved and confirmed and is subject to all city ordinances now in force relating to such matters.

10. It is further expressly agreed that the City shall not be held leable for any delay or stoppage of said work by reason of any injunction or other legal proceedings whatecer except as herein provided.

11. It is further agreed that in the doing of the work under this contract *with* eight (8) hours shall constitute a day's work as provided in Ordinance No. 763, and the laws of the State of Oklahoma, and no person doing work under this contract shall be required to work longer than eight (8) hours each day.

12. In consideration of the completion by the said Contractor, all work embraced in this contract, in strict conformity with the specifications hereinbefore referred to, the city hereby agrees 4 to pay to the said Contractor the following prices, viz: It is further agreed by and between the parties hereto that in the ecution of the work under this contract all persons employed all be American citizens, and residents of this city, and no foreign oor shall be used or employed, viz:

sphalt Macadam pavement, including 5" Portland Cement Foundation....per Sq. yd.....		$2.17
arth Excavation		.35
ck		.35
ncrete Curb and Gutter, 6" curb.. per sq. yd.....		.55
Oak Header, inc. posts....per lin. ft.....		.15
t. Pipe in place, inc. backfill, 10" per lin. ft.....		.60
" " " " " " 12" " " "		.80
" " " " " " 15" " " "		1.00
" " " " " " 18" " " "		1.55
" " " " " " 24" " " "		2.30
ment Pipe in place inc. backfill,..... 30" " " "		2.50
rcular Monolithic in place, including backfill,..... 30" Per lin. ft.....		2.50
x 12 Breeches, ...		1.75
x 18 "		2.00
anholes, complete each		40.00
tch Basins or Sewer Inlets, compl. with castings each....		20.00

5 The City further agrees to pay for all of said work in Street Improvement bonds issued by the city, which the Contractor agrees to accept at par, the forms of which are to be determined by the parties hereto and embraced in an ordinance or ordinances to be passed by the City Council.

The City further agrees that it will cause the levy and collection assessments against the property liable to the same under the laws the State of Oklahoma, and will levy and collect annually, in the nner provided by the laws of the State of Oklahoma, a sufficient to pay the bonds so to be issued, with the annual interest thereon they shall become due; and the city agrees to pay out of the funds en collected from such tax levy said bonds and interest promptly en due to the holders of such securities at the office of the City easurer of Oklahoma City, and the city agrees to cause to be made mptly the annual collections, as provided by law, of a sufficient ount of money to pay the securities so issued, together with all erest charges.

t is further agreed and understood by the parties hereto that deductions shall be made for delays in the progress of the work are occasioned by the weather preventing the contractor from suing the same, and the said City Engineer shall determine

whether or not the weather conditions are such that the work can be carried on.

It is further agreed that all repairs and all pavement required to be made by the contractor during the guarantee period shall
286 be made with materials similar and equal to, and laid in the manner of those described in the specifications for the original improvement. The said contractor hereby expressly promises and agrees to keep said improvements in a first class condition for a period of five (5) years from and after the time of the completion of the same and its acceptance by the city, and agrees further that if it shall fail to do so in any instance, upon notice of ten (10) days in writing given by the Engineer of said city, or the paving committee of the Council of said City, to it, such repairs or reconstructions shall be done by said City, and said City is hereby authorized to make such repairs or reconstruction by contract or otherwise, and to pay for the same out of the improvement bonds held by said City as a guarantee for the maintainance of said improvement, or in case said contractor gives bond, then, by suit upon said bond, the cost thereof, and the said contractor will pay the cost of such repairs or reconstruction, together with all expenses incurred in the recovery thereof, including a reasonable attorney's fee in making such collection, but that no action in any instance for that purpose shall be a bar to any further or future action on account of any past, future or further failure on the part of the contractor to make such repairs or improvements, except that in case the full amount of the penal sum of the bond for maintenance of such work be exhausted.

It is further agreed that the city shall not in any case become liable for the payment of the cost of paving the spaces occupied by the street car tracks, should such spaces be paved by the contractor.

287 It is further agreed that the contractor shall at any time of the approval of this contract by the Mayor and Council of the city furnish a construction bond in the amount of Twenty (20%) per cent. of the total amount of the contract price for the faithful completion of the work in strict conformity to the plans and specifications of the said City Engineer, a copy of said bond is hereto attached; and that upon the approval of said bond by the Mayor and Council this contract shall become effective.

Said contractor hereby promises and agrees to permit said city to retain certificates to the amount of ten (10) per cent. of the contract price as surety that said contractor will keep such improvements in good repair for the full period of five (5) years from and after the acceptance of same by said city, and will in all respects perform the contract with reference to such repairs and improvements for the period of five (5) years. It is agreed that whatever interest is paid upon said warrants that the same will be turned over immediately to said contractor, and whenever the principal upon said certificates is paid the same shall be held by the city for the full period but shall be deposited with the City Treasurer as a separate

fund upon a time deposit herein provided shall be delivered to said contractor. Said contractor shall have the right in lieu of the foregoing surety to at any time furnish a good and sufficient maintenance bond whereupon the same being accepted by said city, all certificates shall be returned to said contractor.

288 The city agrees to pass and adopt such ordinances, orders and resolutions and to take such other proceedings, in conformity with the laws of the State of Oklahoma, as will give to the bonds, which are paid to the contractor under this agreement the highest possible market value and as will best and most speedily give effect to the provisions of the statute and this contract and the Officers and Employes of the city shall at all times and by all proper means facilitate the work to be performed hereunder.

The city shall perform all the obligations imposed upon it by this contract and the laws of the State of Oklahoma promptly and without unnecessary delay, particularly with reference to the levying and collection of the special assessments and payments of the proceeds thereof contemplated by this agreement and the laws of the state above mentioned.

The City agrees that on all cuts made in the said pavement that it will require before issuing a permit for any such cut, a deposit with the City Engineer of a sum of money covering the repairing of such cuts. The contractor shall repair all cuts made on permits issued by the City Engineer within thirty (30) days after the receipt of a notice from the City Engineer notifying the contractor of the cuts, and the city shall pay to the contractor out of the sum deposited with the City Engineer when the permits are issued, at the prices above specified, for the actual amount of repairs made; said sums to be paid to the contractor when the work is completed and accepted by the City Engineer.

289 In Witness Whereof, the contractor, Severns Paving Company, has caused these presents to be signed by its president and attested by its secretary, and the seal of the corporation to be affixed hereto, and the City of Oklahoma City has caused these presents to be signed by its Mayor and attested by its Clerk and the seal of the city to be affixed hereto, the day and year first above written.

SEVERNS PAVING COMPANY.
By J. O. SEVERNS, *Pres.*
By CHAS. T. DERR, *Sec.*

THE CITY OF OKLAHOMA CITY,
OKLAHOMA,
By DAN V. LACKEY,
Mayor.

Attest:
[SEAL.] BOB PARMAN.

290 *Construction Bond.*

Known All Men by These Presents, That we, Severns Paving Company of Oklahoma City, Oklahoma, as principal, and United

States Fidelity and Guaranty Company, a corporation and of Baltimore, Maryland, are held and firmly bound unto the City of Oklahoma City, Oklahoma County, State of Oklahoma, in the penal sum of Eleven Thousand Nine Hundred Ninety ($11,990.00) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly, severally and firmly by these presents.

The conditions of the above obligation are such that whereas, the said principal and the said city, under date of the 31st day of May, 1911, entered into a contract whereby, upon the consideration therein expressed, said Severns Paving Company undertook, contracted and agreed to make certain improvements on Linwood Boulevard from the center line of 16th Street to the east line of Grand Boulevard, in said City of Oklahoma City, Oklahoma, consisting of paving, curbing and other work incident thereto and set forth in said contract, and further promised and agreed to keep said city harmless against all lawful claims for damages to others arising from accidents occasioned by the doing of the work, or the conditions of the streets of said city while the said work is being done, and further promised and agreed to keep said city harmless against any and all claims for work done, and material used in the making of said improvements; it being hereby intended to protect said city absolutely against all claims whatsoever arising out of the making of said improvements whether arising upon contract or otherwise.

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Now, therefore, If the said Severns Paving Company will do and perform all the work and labor, and furnish all the material at its own cost and expense for the making of said improvements and shall make the said improvements in the manner set forth in said contract and in accordance with the plans and specifications of the City Engineer of said city, and within the time fixed and prescribed by said contract, including the keeping the said city harmless from all claims of whatever nature, arising out of the making of said improvements, those for injury to persons or property, as well as for work, labor and material, then, and in that event, the above obligation to be null and void; otherwise, to remain in full force and effect.

Witness our hands at Oklahoma City, State of Oklahoma, this second day of June, 1911.

SEVERNS PAVING COMPANY,
[SEAL.]

By J. A. SEVERNS,
Pres.

By CHAS. T. DERR,
Sec'y.

J. O. SEVERNS,
[SEAL.]

CHAS. T. DERR.

UNITED STATES FIDELITY
AND GUARANTY COMPANY,

By T. M. UPSHAW,
Attorney in Fact.

02 OKLAHOMA CITY, OKLA., May 13, '11.

On the 8th day of November, 1910 and Election was duly and gally held in the City of Oklahoma City by virtue of the Constitu- on of the State of Oklahoma and the laws thereof, for the purpose electing a Board of Freeholders, composed of two from each ward said city to perpare and propose a charter for said city, and hereas,

The persons at said election duly and legally held as such free- olders thereof duly qualified and organized said Board of Free- olders, and did within ninety days after said election prepars and opose a Charter for said City of Oklahoma City, and whereas,

After due publication the said Charter so proposed was submitted the qualified electors of said city at a Special Election held in said y on the 9th day of March, 1911, and at said election the said pro- sed Charter was duly ratified, approved and adopted by a majority such qualified electors voting thereon, and whereas,

On the 14th day of March, A. D., 1911, the said proposed charter adopted and ratified was in the manner required by law duly and gally presented to the Gove-nor of the State of Oklahoma, Hon. Lee nce, for his approval, and on said 14th day of March, 1911, said oposed Charter was duly approved by the Gove-nor, whereby said Charter became and is the organic law of the City, and whereas,

A primary Election was duly and legally held in the City Oklahoma City, Oklahoma, as provided for in said Charter, on 11th day of April, 1911, for the nomination of candidates of respective political parties, and that candidates were thereupon minated, and whereas,

An Election was duly and legally held in the City of Oklahoma y as provided for in said Charter, on the 9th day of May, 1911, the election of a Mayor, who shall be Commissioner of Public airs: Commissioner of Public Works and Commissioner of Public operty, which election was duly held and the officers duly elected reunder.

The officers legally elected at said election of May 9, 1911, were ollows:

Mayor, Whit M. Grant,	Commissioner of Pub. Affrs.			
Elmer C. Trueblood,	Comsnr.	of	Acctng. & Finance.	
J. T. Highley,	"	"	Public Safety.	
Guy M. Blackwelder,	"	"	"	Works.
W. H. Hampton,	"	"	"	Property.

Thereupon, Whit M. Grant, Elmer C. Trueblood, J. T. Highley, E. Blackwelder and W. H. Hampton were administered the of office as required by the Constitution and laws of the State Oklahoma, and filed their bonds as required by the said Charter, were thereupon elected and declared to be the legally qualified ers of the City of Oklahoma City, of date of May 13th, 1911.

294 (Commissioners' Record No. 1, Page —.)

OKLAHOMA CITY, OKLA., June 19, 1911.

The Commissioners of the City of Oklahoma City met in Regular Session at 10 o'clock A. M., with the following members present: Com-. Grant, Trueblood, Blackwelder, Hampton and Highley.

Commissioner of Public Works Blackwelder, to whom was referred the bids for the paving of Linwood Boulevard from the center line of Sixteenth Street to the east line of Grand Boulevard, in the City of Oklahoma City, Oklahoma, reported that the bid of the Severns Paving Company was the lowest and best, and recommended that they be awarded contract for this work. The bids were as follows:

The Western Pav. Co., Approximate Total.... $62,248.84

The bid of the Severns Paving Co. was as follows:

Approximate Total $59,951.71

	(5-yr. Guar.)
Asphalt Macadam, Pavement inc. 5" Portland Cement Concrete Foundation, per sq. yd.	$2.17
Earth Excavation, per cu. yd.	.35
Rock " " "	.35
Concrete Curbing, 6" per lin. ft.	.55
3" Oak Header, inc. posts, per lin. ft.	.15
Vit. Pipe in place, inc. backfill, 10" per lin. ft.	.69
" " " " " backfill, 12" " " "	.80
" " " " " " 15" " " "	1.00
" " " " " " 18" " " "	1.55
" " " " " " 24" " " "	2.30
Cement Pipe in place, inc. backfill, 30" per lin. ft.	2.50
Circular Monolithic Pipe in place, inc. backfill, 30" per lin. ft.	2.50

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10 x 12 Breeches	$1.75
10 x 18 "	2.00
Manholes, complete, each	40.00
Catch Basins or Sewer Inlets, complete with casting, each	20.00

Moved by Mr. Blackwelder, seconded by Mr. Trueblood, that the report of the Commissioner of Public Works be concurred in and the contract for the paving of the above described street awarded to the Severns Paving Company, and the City Attorney be instructed to draw the necessary contract and bond and that said contract stipulate that the work be done under the supervision of the City Engineer, and that all work and material used in the said work shall be subject to his approval. Motion was read and adopted by the fol-

lowing roll call vote: Ayes—Messrs. Grant, Trueblood, Blackwelder, Highley and Hampton.

296 (Commissioners' Record No. 1, Page —.)

OKLAHOMA CITY, OKLA., June 26, 1911.

The Board of Commissioners of the City of Oklahoma City met in Adjourned Session, with the following members present: Commissioners Grant, Trueblood, Blackwelder, Highly and Hampton.

The contract and construction bond of the Severns Paving Company were read for the paving of Linwood Boulevard from the center line of Sixteenth Street to the east line of Grand Boulevard, in the City of Oklahoma City, Oklahoma. Moved by Mr. Blackwelder, seconded by Mr. Hampton, that the contract and bond be approved and contract ordered executed. Motion was read and adopted by the following roll call vote: Ayes—Messrs. Grant, Trueblood, Blackwelder, Highley and Hampton.

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Contract.

This Contract Made and entered into this 24th day of June, 1911, by and between Severns Paving Company of Oklahoma City, Oklahoma, a corporation, hereinafter called The Contractor, party of the first part, and the City of Oklahoma City, Oklahoma, hereinafter called The City, party of the second part.

Witnesseth: That whereas the said contractor is the lowest and best bidder of making improvements under and by virtue of the provisions of a resolution passed by the City Council of the City of Oklahoma City, on the 11th day of October, 1910. Linwood Boulevard from the center line of 16th Street to the east line of Grand Boulevard, by constructing and guaranteeing for a period of five years, as hereinafter provided, an asphalt pavement on the streets and avenues and the unpaved portions thereof above described, and in the manner provided for in said resolution and the specifications of the City Engineer, approved at the meeting of City Council April 3th, 1911.

Now, Therefore, the said Contractor hereby covenants and agrees to furnish all the material and to perform all the work necessary to complete the said improvements according to the terms of said resolution and in conformity to the plans and specifications on file in the City Clerk's office above referred to, to the satisfaction and acceptance of the City Engineer and Board of Commissioners of said Board of Commissioners of said City within One hundred and eighty (180) working days from and after the approval of this contract. Working days shall include all days except only Sundays and legal holidays and such others as are hereinafter excepted.

It is further agreed and understood by the parties hereto that the work herein contemplated shall be commenced at such point or points and prosecuted in such manner and with such

force as the City Engineer of the City may direct, and for each working day beyond the time fixed in this contract for the final completion of the improvement, such completion shall be delayed by the Contractor; said Contractor shall pay to the said City the sum of Twenty-five ($25.00) Dollars per day to cover expense of engineer and inspectors.

It is further expressly agreed and understood by and between the parties hereto that this contract is made subject to the following stipulations and conditions:

1. The party of the first part shall do all the work embraced in this contract so as to conform to the directions of the City Engineer as to the order of time in which the different parts of the work shall be done, as well as to all his other instructions as to the mode of doing the same, not inconsistent with the specifications.

2. Whenever the Contractor is not present on the work, orders will be given by the City Engineer to the Superintendents or Overseers in immediate charge thereof, and shall by them be received and obeyed; and if any person employed on the work shall refuse or neglect to obey the instructions of said City Engineer, in any way relating to the work, or shall appear to the said City Engineer to be incompetent, disorderly or unfaithful, he shall, upon the requisition of said City Engineer be at once discharged and not again employed on any part of the work.

3. Any work not herein or in specifications specified which may be fairly implied as included in this contract, of which the City Engineer shall be the judge, shall be done by the Contractor without extra charge beyond the contract prices.

4. The working days on this contract lost in consequence of injunction or Court proceedings, or bad weather, or by grading, or trenching by other contractors, corporations or individuals over whom the party of the first part has not control, or organized general strikes, or the burning of the plant where the material for this contract is prepared shall not be held to be working days and shall be added to the number of days specified in this contract within which the work shall be completed.

5. If, in the opinion of the Engineer, the Contractor at any time during the progress of the work is not prosecuting the work with sufficient force to insure its completion within the time specified in this contract, he may notify the Contractor by written notice, to employ such additional force as he deems sufficient; and on the failure of said Contractor to comply with such notice within three days after its delivery the said City Engineer may put on such additional force at the cost of the party of the first part; or he may at his option declare such contract annulled, but such declaration must be confirmed and ratified by vote of the council before having any force or effect; and the power is reserved to the City Engineer to sustain or annul this contract, or to suspend the doing of any work thereunder at any time for any failure on the part of the Contractor to fulfill the same, or for other good cause; and any action of the City Engineer in suspending or annulling this contract or suspending the doing of the work thereunder and his

decision as to the existence of the cause or reason for such annullment or suspension shall be conclusive as the existence of such cause or reason in any controversy or litigation between the parties hereto or others claiming under them, unless the Contractor shall appeal from such order or action of the Engineer to the Council without delay and upon such appeal said Board of Commissioners promptly take up and decide the matter in controversy and the decision of the council concerning such matters shall be final unless the Contractor shall commence legal proceedings within five (5) days from the decision of the Council and if this contract be suspended or annulled the party of the first part shall not be entitled to anything on account of damages thereby occasioned unless it shall appear that such annullment or suspension was without good cause, nor shall such annullment or suspension in any wise affect the right of the city to damages and penalty claimed by it on account of the failure of said Contractor, but said abatement or annullment or suspension
301 must be ratified by the Board of Commissioners before being of any force or effect.

6. The Contractor will be required to observe all city ordinances in relation to obstructing the streets, maintaining signals, keeping open passageways and protecting the same where exposed, and generally to obey all laws and ordinances controlling or limiting those engaged on the work; and the Contractor hereby expressly agrees to indemnify and save harmless the City of Oklahoma City from all suits and actions, of every nature and description brought against the said city for, or on account of any injuries or damages received or sustained by any party or parties or by or from the acts of the Contractor or his servants or agents in the performance of their duties in doing the work herein contracted for, or in consequence of any negligence in grading the same, or in any improper materials used in its construction, or by or on account of any acts or omissions of the said party of the first part, its servants or agents.

7. The party of the first part further agrees that it will pay for the work and labor of all laborers and teamsters, teams and wagons employed on the work and for all materials used therein. It is hereby further agreed that the Contractor shall pay engineering, printing, appraisers and all other fees provided for by the ordinances of said city, in cash at the expiration of each and every month.

92 8. To prevent all disputes and litigations, it is further agreed by the parties hereto that the City Engineer and Board of Commissioners shall in all cases determine the amount and quality of the several kinds of work which are to be paid for under this contract; and they shall decide all questions *that* which may arise relative to the execution of the work under this contract on the part of the Contractor, subject, however, to confirmation by the Board of Commissioners in case of appeal to Board of Commissioners. It is further agreed by and between the parties hereto that in the execution of the work under this contract all persons employed shall be American citizens, and residents of this city, and no foreign labor shall be used or employed.

9. This contract is entered into subject to the approval or rejection of the Board of Commissioners of the City of Oklahoma City, and shall not bind either party until so approved and confirmed and is subject to all city ordinances now in force relating to such matters.

10. It is further expressly agreed that the City shall not be held liable for any delay or stoppage of said work by reason of any injunction or other legal proceedings whatever except as herein provided.

303 11. It is further agreed that in the doing of the work under this contract eight (8) hours shall constitute a day's work as provided in Ordinance No. 763, and the laws of the State of Oklahoma, and no person doing work under this contract shall be required to work longer than eight (8) hours each day.

12. In consideration of the completion by the said Contractor, of all work embraced in this contract, in strict conformity with the specifications hereinbefore referred to, the city hereby agrees to pay the said Contractor the following prices, viz:

Guarantee 5 years.

Asphalt Macadam, asphalt pavement, inc., 5 inch Portland cement concrete foundation	per sq. yd.	$2.17
Earth excavation	" " "	.35
Rock "	" " "	.35
Concrete curbing, 6"	" lin. ft.	.55
Cement pipe in place, inc. backfill 30"	" " "	2.50
Circ. Mon-lithic " " " 30"	" " "	2.50
10 x 12 Breeches	" " "	1.75
10 x 18 "	" " "	2.00
3" Oak Header	" " "	.15
Vit. pipe in place, inc., *f*ackfill, 10"	" " "	.60
" " " " " " 12"	" " "	.80
" " " " " " 15"	" " "	1.00
" " " " " " 18"	" " "	1.55
" " " " " " 24"	" " "	2.30
Manholes, complete, each		40.00
Catch Basins, "		20.00

304 The City further agrees to pay for all of said work in Street Improvement bonds issued by the city, which the Contractor agrees to accept at par, the forms of which are to be determined by the parties *th* hereto embraced in an ordinance or ordinances to be passed by the Board of Commissioners.

The City further agrees that it will cause the levy and collection of assessments against the property liable to the same under the laws of the State of Oklahoma, and will levy and collect annually, in the manner provided by the laws of the State of Oklahoma, a sufficient tax to pay the bonds so to be issued, with interest thereon as they shall become due; and the city agrees to pay out of the funds when col-ected from such tax levy said bonds and interest promptly when due to the holders of such securities at the office of the City Treasurer of Oklahoma City, and the city agrees to cause

to be made promptly the annual collections, as provided by law, of a sufficient amount of money to pay the securities so issued, with all interest charges.

It is further agreed and understood by the parties hereto that no deductions shall be made for such delays in the progress of the work as are occasioned by the weather preventing the contractor from pursuing the same, and the Said City Engineer shall determine whether or not the weather conditions are such that the work can be carried on.

305 It is further agreed that all repairs and all pavement required to be made by the contractor during the guarantee period shall be made with materials similar and equal to, and laid in the manner of those described in the specifications for the original improvement. The said contractor hereby expressly promises and agrees to keep said improvements in a first class condition for a period of five (5) years from and after the time of the completion of the same and its acceptance by the city, and agrees further that if it shall fail to do so in any instance upon notice of ten (10) days in writing given by the Engineer of said city, or the Board of Commissioners authorized to make such repairs or reconstruction by contract or otherwise, and to pay for the same out of the improvement bonds held by said City as a guarantee for the maintenance of said improvement, or in case said contractor gives bond, then, by suit upon said bond, the cost thereof, including a reasonable attorney's fee in making such collection, but that no action in any instance for that purpose shall be a bar to any further or future action on account of any past, future or further failure on the part of the contractor to make such repairs or improvements, except that in case the full amount of the penal sum of the bond for maintenance of such work be exhausted.

It is further agreed that the city shall not in any case become liable for the payment of the cost of paving the spaces occupied by the street car tracks, should such spaces be paved by the contractor.

03 It is further agreed that the contractor shall at the time of the approval of this contract by the Mayor and Board of Commissioners of the city furnish a construction bond in the amount of Twenty (20%) per cent. of the total amount of the contract price for the faithful completion of the work in strict conformity to the plans and specifications of the said City Engineer, a copy of said bond is hereto attached; and that upon the approval of said bond by the Mayor and Board of Commissioners this contract shall become effective.

Said contractor hereby promises and agrees to permit said city to retain certificates to the amount of ten (10%) per cent. of the contract price as surety that said contractor will keep such improvements in good repair for the full period of five (5) years from and after the acceptance of same by said city, and will in all respects perform the contract with reference to such matters and repairs and improvements for a period of five (5) years. It is agreed that whatever interest is paid upon said warrants that the same will be turned over immediately to said contractor, and whenever the principal on said certificates is paid the same will be held by the city for

the full period but shall be deposited with the City Treasurer as a separate fund upon a time deposit and the interest thereon shall accrue to said contractor. At the expiration of the said five (5) years' guaranty period all certificates retained herein and all money paid upon said certificates and all interest accured upon said time deposit herein provided shall be delivered to said contractor. Said contractor shall have the right in lieu of the foregoing surety
307 to at any time furnish a good and sufficient maintenance bond whereupon the same being accepted by said city, all certificates shall be returned to said contractor.

The city agrees to pass and adopt such ordinances, orders and resolutions and to take such other proceedings, in conformity with the laws of the State of Oklahoma, as will give to the bonds, which are paid to the contractor under this agreement the highest possible market value and as will best and most speedily give effect to the provisions of the statute and this contract and the Officers and Employes of the city shall at all times and by all proper means facilitate the work to be performed hereunder.

The city shall perform all the obligations imposed upon it by this contract and the laws of the State of Oklahoma promptly and without unnecessary delay particularly with reference to the levying and collection of the special assessments and payments of the proceeds thereof contemplated by this agreement and the laws of the state above mentioned.

The city agrees that on all cuts made in the said pavement that it will require before issuing a permit for any such cut, a deposit with the City Engineer of a sum of money covering the repairing of such cuts. The contractor shall repair all cuts made on permits issued by the City Engineer within thirty (30) days after the receipt of a notice from the City Engineer when the permits are issued, at the prices above specified, for the actual amount of repairs made;
308 said sums to be paid to the contractor when the work is completed and accepted by the City Engineer.

In Witness Whereof, the contractor, Severns Paving Company, has caused these presents to be signed by its president and attested by its secretary, and the seal of the corporation to be affixed hereto, and the City of Oklahoma City has caused these presents to be signed by its Mayor and attested by its Clerk and the seal of the city to be affixed, hereto, the day and year first written above.

SEVERNS PAVING COMPANY, [SEAL.]
J. O. SEVERNS,
Pres.,
By CHAS. T. DERR,
Secretary.
THE CITY OF OKLAHOMA CITY,
OKLAHOMA.
By WHIT M. GRANT,
Mayor.

Attest:
[SEAL.] C. R. GOUCHER,
City Clerk.

309 *Construction Bond.*

Known All Men By These Presents, That we, Severns Paving Company of Oklahoma City, Oklahoma as principal, and United States Fidelity and Guaranty Company, a corporation of Baltimore, Maryland and are held and firmly bound unto the City of Oklahoma City, Oklahoma County, State of Oklahoma, in the penal sum of Eleven Thousand nine Hundred ninety ($11,990.00) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly, severally and firmly by these presents.

The conditions of the above obligations are such that whereas, the said principal and the said city, under date of the 24th day of June, 1911, entered into a contract whereby, upon the consideration herein expressed, said Severns Paving Company undertook, contracted and agreed to make certain improvements on Linwood Boulevard from the center line of 16th Street to the East line of Grand Boulevard in said City of Oklahoma City, Oklahoma, consisting of paving, curbing and other work incident thereto and set forth in said contract, and further promised and agreed to keep said city harmless against all lawful claims for damages to others arising from accidents occasioned by the doing of the work, or the conditions of the streets of said city while the work is being done, and further promised and agreed to keep said city harmless against any and all claims for work done and material used in the making of said improvements; it being hereby intended to protect said city absolutely against all claims whatsoever arising out of the making of said improvements whether arising upon contract or otherwise.

Now, Therefore: If the said Severns Paving Company will do and perform all the work and labor, and furnish all the material at its own cost and expense for the making of said improvements, and shall make the said improvements in the manner set forth in said contract and in accordance with the plans and specifications of the City Engineer of said city, and within the time fixed and prescribed by said contract, including the keeping the said city harmless from all claims of whatever nature, arising out of the making of said improvements, those for injury to persons of property, as well as for work, labor and material, then, and in that event the above obligations to be null and void; otherwise, to remain in full force and effect.

Witness our hands at Oklahoma City, State of Oklahoma, this twenty-third day of June, 1911.

SEVERNS PAVING COMPANY, [SEAL.]

J. O. SEVERNS. [SEAL.]

CHAS. T. DERR.

By CHAS. T. DERR, *Sec'y.*

By J. C. SEVERNS, *Pres.*

UNITED STATES FIDELITY AND GUARANTY COMPANY,

By T. M. UPSHAW,

Its Attorney in Fact.

(Commissioners Journal #1, Page 329.)

311 OKLAHOMA CITY, OKLA., Nov. 6, 1911.

The Board of Commissioners of the City of Oklahoma City met in Regular Session at 10 O'clock A. M. The Mayor being absent, Mr. Hampton, Mayor Pro Tem, presided. There being no quorum present meeting was adjourned by the Mayor pro tem to 2 o'clock P. M. Nov. 6, 1911.

(Page 355.)

OKLAHOMA CITY, OKLA., Nov. 6, 1911.

The Board of Commissioners of the City of Oklahoma City met in adjourned session at 2 o'clock P. M. Mayor Grant being absent, Mr. Hampton, Mayor pro tem, presided with the following Commissioners present: Messrs. Hampton, Blackwelder and Highley.

City Engineer McClure submitted final estimate for Paving as follows:

"Nov. 6, 1911. To the Hon. Board of Commissioners, City of Oklahoma, Gentlemen: I hereby certify that the total cost of the construction of pavement and other improvements in the Street Improvement Dist. of Linwood Blvd. from the center line of 16th St. to the E. line of Grand Blvd. under a contract of the Severns Paving Co. with the City, has been ascertained to be the

sum of.....$56,847.05
and other expenses incurred by the City incident to such improvements, in addition to the contract price, has been ascertained to be as follows:

Engineering 2-½%	1,421.18
Advertising, Appraisement, etc.....	405.00
Total cost to be apportion- & assessed.....	$58,673.23

Respectfully submitted,

GUY V. McCLURE,
City Engineer.

312 Moved by Mr. Blackwelder, seconded by Mr. Highley that the final estimate be adopted and Resolution appointing appraisers ordered drawn. Motion was read and adopted by the following roll call vote: Ayes: Hampton Blackwelder and Highley.

Resolution was read appointing appraisers for the Paving of Linwood Blvd. from the center line of 16th St. to the E. line of Grand Blvd. in Oklahoma City, Okla.

Moved by Mr. Blackwelder, seconded by Mr. Highley that the Resolution be adopted as read. Motion was then read and adopted by the following roll call vote: Hampton, Blackwelder and Highley.

313 *Resolution.*

Appointing Three Disinterested Appraisers to Appraise and Apportion the Benefits to the Several Lots and Tracts of Land Chargeable with the Cost of Paving and Otherwise Improving the Street Improvement District of Linwood Blvd., from the Center Line of 16th Street to E. Line of Grand Blvd. in the City of Oklahoma City, Oklahoma.

Be it Resolved by the Board of Commissioners of the City of Oklahoma City, Oklahoma:

That Whereas, the Board of Commissioners have heretofore by certain resolutions and other official acts duly provided for the construction of certain public improvements, and have heretofore let and entered into a written contract with the Severns Paving Company, date- this 24th day of June, 1911, for such improvements, whi-h consist of the Paving and otherwise improving of the portions of the Streets and avenues and other public places above described, and the doing of the necessary work incident thereto as is more particularly described in the proceedings of the Board of Commissioners and the plans and specifications with reference thereto, on file and of record in said City, and

Whereas, the cost of said Improvements, including all other expenses incident to said improvements, in addition to the contract price for the work and materials, has been ascertained and fixed at the sum of $58,673.23, and

314 Whereas, the City of Oklahoma City is obligated by the terms of the said contract, and the law in such cases made and provided, to assess, levy and collect the cost of said improvements against the lots and tracts of land benefited thereby and liable therefor.

Now, Therefore, W. P. Knapp, S. A. Calhoun and W. A. McKee, who are three disinterested freeholders of said city and not owners of any property to be assessed, are hereby appointed a Board of Appraisers to appraise and apportion the benefits to the several lots and tracts of land to be assessed and charged with the cost of said improvements, and perform all such acts and things in the premises as by law they are or may be empowered to do, Said appraisers shall, within five days after being notified of their appointment by the City Clerk of said City, and after taking and subscribing an oath to make true and impartial appraisement and apportionment, proceed to appraise and apportion the benefits to the several lots and tracts of land designated in the statement market "Exhibit A," attached hereto and made part hereof, and said appraisers shall make written report of

their appraisement and apportionment, and shall return and file the same with the City Clerk within ten days from the date of their appointment.

Adopted and Approved Nov. 6, 1911.

[SEAL.] WHIT M. GRANT,
Mayor.

Attest:
C. R. GOUCHER,
[SEAL.] *City Clerk.*

315 "EXHIBIT A."

Statement of Lots and Tracts of Land to Which Are to be Appraised and Apportioned the Benefits Resulting from Paving and Otherwise Improving Linwood Boulevard from the Center Line of 16th Street to the East Line of Grand Boulevard.

Block	addition.		Lot or part of lot.
18	Linwood Place	S. ½ of	8
"	"		10
"	"		11
"	"		12
"	"		13
"	"		14
"	"		15
19	"		4
"	"		5
"	"		6
"	"		7
"	"	N. ½ of	8
"	"		1
"	"		2
"	"		3
25	"		7
"	"		8
"	"		9
"	"		10
"	"		11
"	"		12
24	"		4
"	"		5

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24	Linwood Place	N. ½ of	6
"	"		1
"	"		2
"	"		3
32	"		7
"	"		8
"	"		9

Block	addition.		Lot or part of lot.
"	"	.....	10
"	"	.....	11
"	"	.....	12
33	"	.....	4
"	"	.....	5
"	"	.....	6
"	"	.....	1
"	"	.....	2
"	"	.....	3
39	"	.....	9
"	"	.....	10
"	"	.....	11
"	"	.....	12
"	"	.....	13
"	"	S. ½ of.....	2
"	"	.....	3
38	"	.....	5
"	"	.....	6
"	"	W. 40 feet of.....	3
"	"	.....	4
"	"	.....	1
"	"	.....	2
"	"	.....	11

317 A triangular tract of land situated at the intersection of Drexel Boulevard and Linwood Boulevard described as follows: Commencing at a point 100 ft. south and 20 ft. east of the Southeast corner of Block 39, Linwood Place Addition; thence west parallel with the north line of Linwood Boulevard 105 ft. more or less; thence in a southeasterly direction along a curved line parallel with the right of way of the Oklahoma Railway to a point 105 ft. due south of the point of beginning; thence north parallel with the east line of Drexel Blvd. to place of beginning.

A Tract of land situated in the northeast quarter of Section 25, T. 12 N., R. 4 W., I. M., described as follows: Commencing at the northeast corner of Drexel Blvd. and 19th St., thence north along the east line of Drexel Blvd 150 ft.; thence east parallel with the north line of 19th St., 290 ft., thence south paral*e*l with *with* the east line of Drexel Blvd. 150 ft. to the north line of 19th St.; thence west along the north line of 19th St. to place of beginning.

A tract of land situated in the northeast quarter of Section 25, T. 12 N., R. 4 W., I. M., described as follows: Commencing at the southeast corner of 19th St. and Linwood Boulevard; thence south along the east line of Linwood Boulevard 150 ft.; thence parallel with the south line of 19th St. 290 ft.; thence north parallel with the east line of Linwood Blvd. to the south line of 19th St.; thence west along the south line of 19th St. to the place of beginning.

318 A portion of the northeast quarter of Section 25, T. 12 N., R. 4 W., I. M., described as follows: Commencing at the

northeast corner of 18th St. and Linwood Boulevard; thence north along the east line of Linwood Boulevard 150 ft.; thence parallel with the north line of 18th St. 290 ft.; thence west along the north line of 18th St. to place of beginning.

A tract of land situated in the northeast quarter of Section 25, T. 12 N., R. 4 W., I. M., described as follows: Commencing at the southeast corner of 18th St. and Linwood Blvd.; thence south along the east line of Linwood Boulevard 150 ft.; thence east parallel with the south line of 18th St. 290 ft.; thence north parallel with the east line of Linwood 150 ft. to the south line of 18th St.; thence west along the south line of 18th St. to place of beginning.

A tract of land situated in the northeast quarter of Section 25, T. 12 N., R. 4 W., I. M., described as follows: Commencing at the northeast corner of 17th St. and Linwood Boulevard; thence north along the east line of Linwood Boulevard 150 ft.; thence parallel with the north line of 17th St. 290 ft.; thence south parallel with the east line of Linwood Boulevard 150 ft. north to the north line of 17th St.; thence west along the north line of 17th St. to place of beginning.

Block addition.		Lot or part of lot.
37 Linwood Place		1
" "		2
" "		4
" "	E. ½ of	5
" "		3

319

37 Linwood Place,	E. ½ of	12
" "		13

A tract of land situated in the northeast quarter of Section 25, T. 12 N., R. 4 W., I. M., described as follows: Commencing at the southeast corner of 16th St. and Linwood Boulevard; thence north along the east line of Linwood Boulevard 150.175 ft.; thence east parallel with the north line of 16th St. 290 ft.; thence south parallel with the east line of Linwood Boulevard to the north line of 16th St.; thence west along the north line of 16th St. to place of beginning.

Block addition.		Lot or part of lot.
36 Linwood Place		1
" "		2
" "		4
" "	E. ½ of	5
" "		3
" "		14
" "		15

Oklahoma Railway Right-of-Way, Oklahoma City.

320 (Commissioner Journal #1, Page 357.)

OKLAHOMA CITY, OKLA., Nov. 20, 1911.

The Board of Commissioners of the City of Oklahoma City met in Regular Session at 10 o'clock A. M. There being no quorum present Mayor Grant adjourned the meeting to meet Nov. 20, 1911, at 2 o'clock P. M.

(Page 361.)

OKLAHOMA CITY, OKLA., Nov. 20, 1911.

The Board of Commissioners of the City of Oklahoma City met in Adjourned session at 2 o'clock P. M. with Mayor Grant and following Commissioners present: Blackwelder, Hampton, Highley and Trueblood.

The Report of the Board of Appraisers, filed in the office of the City Clerk Nov. 20, 1911, was read for the Paving of Linwood Blvd. from the center line of 16th St. to the east line of Grand Blvd. in Oklahoma City, Oklahoma. Moved by Mr. Blackwelder, seconded by Mr. Trueblood that the Report be received and the Clerk instructed to advertise meeting of the Board of Commissioners as Reviewing Board to meet on Dec. 4, 1911, at 9.30 A. M. Motion was then read and adopted by the following roll call vote: Ayes Grand, Blackwelder, Hampton, Highley and Trueblood.

321 *Affidavit of Publication.*

STATE OF OKLAHOMA,
County of Oklahoma, ss:

F. R. Dickel of lawful age being first duly sworn upon oath, deposes and says: That he is one of the publishers of The Oklahoma News. A newspaper of general circulation, printed and published at Oklahoma City, in said County and State of Oklahoma; and that the Notice of Publication, a copy of which is hereto annexed, was published in the daily edition of said paper five (5) consecutive issues; the first publication being on the 22nd day of Nov., 1911, and the last upon the 27th day of Nov., 1911.

F. R. DICKEL.

Subscribed and sworn to before me this 27th day of Nov., 1911.

R. A. PARMAN,
Notary Pub.

My commission expires Aug. 21, 1912.

322 (Published Nov. 22 to 27, Inc., 1911.)

Notice of Meeting.

Notice is hereby given that the Board of Commissioners will meet on the 4th day of December, 1911 at 9:30 A. M. in the Commis-

sioners' Chamber in the City Hall Building, in the City of Oklahoma City, Oklahoma, for the purpose of reviewing the report of the Board of Appraisers making the appraisement and apportionment on various lots, pieces and parcels of land charged with the cost of paving and otherwise improving Linwood Blvd. from the center line of 16th St. to the E. line of Grand Boulevard in Oklahoma City, Oklahoma, and the report of the Board of Appraisers is hereto attached and published herewith. At said meeting the Board of Commissioners will hear and adjust any complaints and review any appraisement and apportionment made by the Board of Appraisers, as provided by law, and will review, correct, raise or lower the same and the Board of Commissioners will adjourn from day to day and from time to time until their labors are completed. At said meeting all persons interested may appear and be heard.

[SEAL.] C. R. GOUCHER,
City Clerk.

323 *Oath of Appraisers.*

Street Improvement District of Linwood Boulevard from the Center Line of 16th Street to the East Line of Grand Boulevard, in Oklahoma City, Oklahoma.

STATE OF OKLAHOMA,
County of Oklahoma, ss:

W. P. Knapp, S. A. Calhoun and W. A. McKee having been appointed a Board of Appraisers by resolution of the Board of Commissioners of the City of Oklahoma City, Oklahoma, on the 6th day of November, 1911, to appraise and apportion to the several lots and tracts of land chargeable thereto on account of paving and otherwise improving the parts of streets, avenues and other public places above described, being first duly sworn, each for himself deposes and says that he is a disinterested freeholder of said City of Oklahoma City and not the owner of any property to be assessed for the making of said improvements and that he will make true and impartial appraisement and apportionments of the benefits accruing to the several lots and tracts of land chargeable with the cost of making said improvements, and that he will make written report thereof and file the same with the City Clerk of said City, as required by law and the provisions of said resolution.

W. P. KNAPP,
S. A. CALHOUN.
W. A. McKEE.

Subscribed and sworn to before me this 7th day of Nov., 1911.
[SEAL.] E. C. DAVIS,
Notary Pub.

My commission expires July 10th, 1915.

324 *Report of Appraisers.*

November 15, 1911.

To the Board of Commissioners, City of Oklahoma City, Oklahoma.

GENTLEMEN: We, the undersigned, Board of Appraisers appointed by resolution of your Honorable Body to appraise and apportion the several lots and tract of land chargeable with the cost of improvements thereof, the benefits resulting thereto on account of paving and otherwise improving the parts of Linwood Boulevard from the center line of 16th St. to the east line of Grand Boulevard, in the City of Oklahoma City, Oklahoma, in the aggregate amount of $58,673.23, do hereby certify that we met in the City Hall in the City Clerk's office in said City, on the 7th day of November, 1911, and organized as a Board of appraisers, and selected S. A. Calhoun as Chairman, and W. A. McKee as Secretary thereof; that we, at said time, severally took and subscribed an oath to make true and impartial appraisement and apportionment to the several lots and tracts of land designated in the resolution by which we were appointed, of the benefits resulting thereto on account of the making of said improvement and that in making said appraisement and apportionment, we first apportioned to each quarter-block its due proportionate charge, according to the amount and cost of work performed upon the abutting streets and other public places, including street intersections and alley crossings; which respective amounts so appraised, apportioned and adopted we find just, equitable and accurate, and that the several respective quarter-blocks are benefitted to the extent
325 of the respective amounts so *so* apportioned; that after such subdivision into quarter-block districts, we appraised and apportioned to the several lots and tracts of land therein, the respective amounts set opposite the description of said lots and tracts of land contained in the statement attached hereto, marked "Exhibit A" and made part hereof, which respective amounts we find equitable and just, and according to the benefits accruing to said several lots and tracts of land.

Respectfully submitted,

W. P. KNAPP,
S. A. CALHOUN,
W. A. McKEE,
Appraisers.

326 "EXHIBIT A."

Statement of Lots and Tracts of Land to Which are to be Appraised and Apportioned the Benefits Resulting from Paving and Otherwise Improving Linwood Boulevard from the Center Line of 16th Street to the East Line of Grand Boulevard.

Block addition.			Lot or part of lot.	Amount of benefit.
18	Linwood Place, S. ½ of		8	$201.14
"	"		9	644.86
"	"		10	406.15
"	"		11	553.11
"	"		12	577.55
"	"		13	586.04
"	"		14	586.04
"	"		15	603.72
19	"		4	563.93
"	"		5	543.61
"	"		6	399.22
"	"		7	632.56
"	"	N. ½ of	8	197.31
"	"		1	585.99
"	"		2	570.82
"	"		3	570.82
25	"		7	640.57
"	"		8	618.31
"	"		9	618.31
"	"		10	624.57
"	"		11	624.53
"	"		12	652.41

327

24	Linwood Place, N. ½ of		4	$596.34
"	"		5	596.35
"	"		6	617.74
"	"		1	615.47
"	"		2	590.58
"	"		3	590.58
32	"		7	677.94
"	"		8	650.28
"	"		9	650.28
"	"		10	639.95
"	"		11	639.90
"	"		12	665.10
33	"		4	625.17
"	"		5	625.17
"	"		6	651.66
"	"		1	649.27
"	"		2	626.68

Block	addition.		Lot or part of lot.	Amount of benefit.
"	"	.....	3	626.68
39	"	.....	9	658.28
"	"	.....	10	508.54
"	"	.....	11	508.54
"	"	.....	12	563.08
"	"	.....	13	618.14
"	"	S. ½ of.....	2	226.20
38	"	.....	3	976.25
"	"	.....	5	541.90
"	"	.....	6	740.21
"	"	W. 40 ft. of.....	3	282.63
"	"	.....	4	518.09
"	"	.....	1	1632.35

328

38	Linwood Place, W. 40 ft. of.....		2	$649.83
"	"	.....	11	194.56

A triangular tract of land situated at the intersection of Drexel Boulevard and Linwood Boulevard described as follows: Commencing at a point 100 ft. south and 20 ft. east of the Southeast corner of Block 39, Linwood Place Addition; thence west parallel with the north line of Linwood Boulevard 105 ft. more or less; thence in a southeasterly direction along a curved line parallel with the east line and right of way of the Oklahoma Railway to a point 105 ft. due south of the point of beginning; thence north parallel with the east line of Drexel Boulevard to place of beginning, 624.79.

A tract of land situated in the northeast quarter of Section 25, T. 12 N., R. 4 W., I. M. described as follows: commencing at the northeast corner of Drexel Blvd. and 19th St.; thence north along the east line of Drexel Blvd. 150 ft.; thence east parallel with the north line of 19th st. 290 ft.; thence south parallel with the east line of Drexel Boulevard 150 ft.; thence to north line of 19th St.; thence west along the north line of 19*ht* St. to place of beginning, 525.19.

A tract of land situated in the northeast quarter of Section 25, T. 12. N., R. 4 W., I. M. described as follows: Commencing at the southeast corner of 19th St. and Linwood Boulevard; thence south along the east line of Linwood Boulevard 150 ft; thence east
329 parallel with the south line of 19th St. 290 ft.; thence north parallel with the east line of Linwood Boulevard to the south line of 19th St.; thence west along the south line of 19th St. to place of beginning, 1349.28.

A portion of the northeast quarter of Section 25, T. 12 N., R. 4 W., I. M., described as follows: Commencing at the northeast corner of 18th St. and Linwood Boulevard; thence north along the east line of Linwood Boulevard 150 ft.; thence east parallel with the north line of 18th St. 290 ft.; thence south parallel with the east line of Linwood Boulevard to the north line of 18th St.; thence west along the north line of 18th St. to place of beginning, 1198.33.

A tract of land situated in the northeast quarter of Section 25, T. 12 N., R. 4 W., I. M. described as follows: Commencing at the southeast corner of 18th St. and Linwood Boulevard; thence south along the east line of Linwood Boulevard 150 ft.; thence east parallel with the south line of 18th St. 290 ft.; thence north parallel with the east line of Linwood Boulevard 150 ft. to the south line of 18th St.; thence west along the south line of 18th St. to place of beginning 1211.52.

A tract of land situated in the northeast quarter of Section 25, T. 12 N., R. 4 W., I. M. described as follows: Commencing at the northeast corner of 17th St. and Linwood Boulevard; thence north along the east line of Linwood Boulevard 150 ft.; thence east
330 parallel with the north line of 17th St. 290 ft; thence south parallel with the east line of Linwood Boulevard 150 ft.; to the north line of 17th st. thence west along the north line of 17th St. to place of beginning..... 1217.64

37	Linwood	Place.....	1	662.29
"	"	.....	2	636.44
"	"	.....	4	137.58
"	"	E. ½ of.....	5	68.79
"	"	.....	3	678.04
"	"	E. ½ of.....	12	70.58
"	"	.....	13	141.15

A tract of land situated in the northeast quarter of Section 25, T. 12 N., R. 4 W., I. M. described as follows: Commencing at the southeast corner of 17th St. and Linwood Boulevard; thence south along the east line of Linwood Boulevard 150.175 ft.; thence east parallel with the south line of 17th St. 290 ft.; thence north parallel with the east line of Linwood Boulevard 150-175 ft. to the south line of 17th St.; thence west along the south line of 17th St. thence to place of beginning, 1211.18.

A tract of land situated in the northeast quarter of Section 25, T. 12, N., R. 4 W., I. M. described as follows: Commencing at the northeast corner of 16th St. and Linwood Boulevard; thence north along the east line of Linwood Boulevard 150.175 ft. thence east parallel with the north line of 16th St. 290 ft.; thence south parallel with the east line of Linwood Boulevard to the north line of
331 16th St.; thence west along the north line of 16th St. to place of beginning..... 1173.77

36	Linwood	Place.....	1	684.18
"	"	.....	2	630.91
"	"	.....	4	142.54
"	"	E. ½ of.....	5	71.27
"	"	.....	3	644.64
"	"	.....	14	100.16
"	"	.....	15	100.16

Oklahoma Railway, Right-of-way.....	12046.16
Oklahoma City	1389.33

332 (Commissioners Journal #1 Page 380.)

OKLAHOMA CITY OKLA., Dec. 4, 1911.

The Board of Commissioners of the City of Oklahoma City met in Special Session as Reviewing Board, as per advertised call at 9:30 A. M., with the Mayor Grant and following Commissioners present: Blackwelder, Hampton, Highley and Trueblood.

Notice of Meeting of the Board of Commissioners as Reviewing Board was read for the Paving of Linwood Blvd. from the center line of 16th St. *the* the E. line of Grand Boulevard, in Oklahoma City, Oklahoma.

The Following Resolutions was read:

Whereas, the Board of Appraisers heretofore appointed have returned their report of appraisement and apportionment of the benefits to the lots and tracts of land chargeable with the cost of paving Linwood Blvd. from the center line of 16th St. to the E. line of Grand Boulevard in Oklahoma City, Oklahoma, and Whereas, the Board of Commissioners have heretofore appointed a time and place for holding a session to hear any complaints or objections that may be made concerning such appraisement and apportionment, and notice of such session has been published as required by law, and Whereas, at said session no complaints or objections having been made and said report having been reviewed as required by law, Therefore Be It Resolved By the Board of Commissioners of the City of Oklahoma City, Oklahoma, That said appraisement and apportionment, so made and returned by said *said* Board of Appraisers, so reviewed, and the same is hereby confirmed and approved.

Adopted and approved this 4th day of December, 1911.

WHIT M. GRANT,
Mayor.

Attest:

[SEAL.] C. R. GOUCHER,
City Clerk.

Moved by Mr. Blackwelder, seconded by Mr. Hampton that the Resolution be adopted as read. Motion was then read and adopted by the following roll call vote: Ayes, Grant, Blackwelder, Hampton, Highley and Trueblood.

(Commissioners Journal #1 Page 381.)

OKLAHOMA CITY, OKLA., Dec. 4, 1911.

The Board of Commissioners of the City of Oklahoma City met in Regular Session at 10 o'clock A. M. with Mayor Grant and the following Commissioners present: Blackwelder, Hampton, Highley and Trueblood.

Moved by Mr. Blackwelder, seconded by Mr. Trueblood that the Board of Commissioners adjourn to meet at 2:30 P. M., Dec. 4, 1911. Motion carried.

(Page 386.)

OKLAHOMA CITY, OKLA., Dec. 4, 1911.

The Board of Commissioners of the City of Oklahoma City met in Regular session, as per adjournment of Dec. 4, 1911, at 2:30 P. M. with the Mayor and following Commissioners present: Grant, Blackwelder, Hampton, Highley and Trueblood.

The following Ordinance was introduced and read: An Ordinance to assess the cost of Street Improvements in Street Improvement District of Linwood Boulevard from the center line of 16th St. to the east line of Grand Boulevard in Oklahoma City, Oklahoma, against the several lots and tracts of land in said Street Improvement District.

Moved by Mr. Blackwelder, seconded by Mr. Trueblood that Ordinance be laid over for one week for final action. Motion was then read and adopted by the following Ayes, Grant, Blackwelder, Hampton, Highley and Trueblood.

335 (Commissioners Journal #1 Page 392).

OKLAHOMA CITY, OKLA., Dec. 11, 1911.

The Board of Commissioners of the City of Oklahoma City met in Regular Session with the Mayor at 10 o'clock A. M., with the following Commissioners present: Blackwelder, Hampton, Highley and Trueblood.

Moved by Mr. Trueblood, seconded by Mr. Hampton that the Board of Commissioners adjourn to meet at 2 o'clock P. M. Dec. 11, 1911. Motion carried.

(Page 404.)

OKLAHOMA CITY, OKLA., Dec. 11, 1911.

The Board of Commissioners of the City of Oklahoma City met in Regular Session at 2 o'clock P. M., as per adjournment of Dec. 11, 1911, with Mayor Grant and the following Commissioners present: Blackwelder, Hampton, Highley and Trueblood.

Commissioner of Public Works Blackwelder reported favorable and recommending the final passage of an Ordinance levying a special tax and charging each tract of land liable therefor with its proper share of the cost of Street Improvements in Street Improvement District of Linwood Blvd. from the center line of 16th St. to the E. line of Grand Boulevard in the City of Oklahoma City, Oklahoma, against the several lots and tracts of land in said Street Improvement District.

Moved by Mr. Blackwelder, seconded by Mr. Hampton that the report be concurred in and Ordinance read a second time by its title. Motion was then read and adopted by the following roll call vote: Ayes, Grant, Blackwelder, Hampton, Highley and Trueblood.

336 Section 3 was read. Moved by Mr. Blackwelder, seconded by Mr. Hampton the Sec. 3 be adopted as read. Motion was then read and adopted by the following roll call vote: Ayes, Grant, Blackwelder, Hampton, Highley and Trueblood.

Moved by Mr. Blackwelder, seconded by Mr. Hampton that Ordinance be placed on final passage and passed as a whole. Motion was then read and adopted by the following roll call vote: Ayes, Grant, Blackwelder, Hampton, Highley and Trueblood.

337 *Affidavit of Publication.*

Ord. 1598.

STATE OF OKLAHOMA,
County of Oklahoma, ss:

F. R. Dickel of lawful age being first duly sworn upon oath, deposes and says: That he is one of the publishers of The Oklahoma News, A paper of general circulation, printed and published at Oklahoma City, in said County and State of Oklahoma; and that the Notice of Publication, a copy of which is hereto attached, was published in the Daily edition of said paper three consecutive issues; the first publication being on the 13th day of Dec. 1911, and the last upon the 15th day of Dec., 1911.

F. R. DICKEL.

Subscribed and sworn to before me this 15th day of Dec., 1911.
[SEAL.] R. A. PARMAN,
Notary Pub.

My Commission Expires August 21, 1912.

338 (Published in the Oklahoma City News Dec. 13 to 15, Inclusive, 1911.)

Ordinance No. 1598.

An Ordinance to Assist the Cost of Street Improvements in Street Improvements District of Linwood Boulevard from the Center Line of 16th Street to the East Line of Grand Boulevard, in the City of Oklahoma City, Oklahoma, Against the Several Lots and Tracts of Land in Said Street Improvement District.

Be it Ordained by the Board of Commissioners of the City of Oklahoma City, Oklahoma:

Section 1. That, Whereas, the Board of Appraisers, heretofore appointed by resolution to appraise and apportion the benefits resulting from the paving and otherwise improving of the portions of

streets, avenues and other public places described in the title of this ordinance, to the several lots and tracts of land which are held liable to assessment to pay the cost of such improvements, which cost has been ascertained to be the sum of $58,673.23, have performed their duties according to law, as such appraisers, and have returned and filed with the City Clerk a written report of their said appraisement and apportionment, and

Whereas, after the filing of said report, the board of commissioners did appoint a time for holding a session to hear and consider any complaints or objections concerning such appraisement and apportionment, and caused due notice of such session to be published according to law, and in pursuance of such action and publication, such session was duly convened and held by the Board of Commissioners on the 4th day of December, 1911, and

339 Whereas, at said session the Board of Commissioners did hear and consider all complaints and objections to said appraisement and apportionment, and did then and there review the same and did by resolution confirm said appraisement and apportionment, as so reviewed, and

Whereas, all legal requirements have been fully complied with to authorize the levying of assessments to pay the cost of said improvements, against the several lots and tracts of land liable to such assessment.

Now Therefore, there shall be and hereby is levied and assessed against the several lots and tracts of land in said Street Improvement District, with the improvements thereon and appurtenances thereto belonging, the amounts respectively stated in said report of the Board of Appraisers, as reviewed and confirmed, as follows:

"EXHIBIT A."

Statement of Lots and Tracts of Land to Which are to be Appraised and Apportioned the Benefits Resulting from Paving and Otherwise Improving Linwood Boulevard from the Center Line of 16th Street to the East Line of Grand Boulevard.

Block addition.	Lot or part of lot.	Amount of benefit.
18 Linwood Place, S. ½ of.....	8	$201.14
" "	9	644.86
" "	10	406.15
" "	11	553.11
" "	12	577.55
" "	13	586.04
" "	14	586.04
" "	15	603.72
340		
19 Linwood Place, S. ½ of.....	4	$563.93
" "	5	543.61

Block	addition.		Lot or part of lot.	Amount of benefit.
"	"	.....	6	599.22
"	"	.....	7	632.56
"	"	N. ½ of	8	197.31
"	"	.....	1	587.99
"	"	.....	2	570.82
25	"	.....	3	570.82
"	"	.....	7	640.57
"	"	.....	8	618.31
"	"	.....	9	618.31
"	"	.....	10	624.57
"	"	.....	11	624.53
24	"	.....	12	652.41
"	"	.....	4	596.34
"	"	.....	5	596.35
"	"	.....	6	617.74
"	"	.....	1	615.47
"	"	.....	2	590.58
32	"	.....	3	590.58
"	"	.....	7	677.94
"	"	.....	8	650.28
"	"	.....	9	650.28
"	"	.....	10	639.95
"	"	.....	11	639.90
33	"	.....	12	665.10
		.....	4	625.17
341				
33	Linwood Place, N. ½ of	.....	5	$625.17
"	"	.....	6	651.66
"	"	.....	1	649.27
"	"	.....	2	626.68
39	"	.....	3	626.68
"	"	.....	9	658.28
"	"	.....	10	508.54
"	"	.....	11	508.54
"	"	.....	12	563.08
"	"	S. ½ of	2	226.20
"	"	N. ½ of	13	618.14
8	"	.....	3	976.25
"	"	.....	5	541.90
"	"	.....	6	740.21
"	"	W. 40 ft. of	3	282.63
"	"	.....	4	518.09
"	"	.....	1	1632.35
"	"	.....	2	649.83
		.....	11	194.56

342 A triangular tract of land situated at the intersection of Drexel Boulevard and Linwood Boulevard described as follows: Commencing at a point 100 ft. South and 20 ft. East of the Southeast corner of Block 39, Linwood Place Addition; thence west parallel with the North line of Linwood Boulevard 105 ft. more or less; thence in a southeasterly direction along a curved line parallel with the right-of-way of the Oklahoma Railway to a point 105 ft. due south of the point of beginning; thence north parallel with the east line of Drexel Blvd. to place of beginning ..... 624.79.

A tract of land situated in the northeast quarter of Section 25, T. 12, N., R. 4 W., I. M., Described as follows: Commencing at a point at the northeast corner of Drexel Boulevard and 19th St.; thence north along the east line of Drexel Boulevard 150 ft.; thence east parallel with the north line of 19th St. 290 ft.; thence south parallel with the east line of Drexel Blvd. 150 ft.; thence to the north line of 19th St.; thence west along the north line of 19th St. to place of beginning ..... 525.19.

A tract of land situated in the northeast quarter of Section 25, T. 12, N., R. 4 W., I. M., described as follows: Commencing at the southeast corner of 19th St. and Linwood Boulevard; thence south along the east line of Linwood Boulevard 150 ft.; thence east parallel with the south line of 19th St. 290 ft.; thence north parallel with the east line of Linwood Boulevard to the south line of 19th St.; thence west along the south line of 19th St. to place of beginning 1349.28.

343 A partion of the northeast quarter of Section 25, T. 12, N., R. 4 W., I. M., described as follows: Commencing at the northeast corner of 18th St. and Linwood Boulevard; thence north along the east line of Linwood Boulevard 150 ft.; thence east parallel with the north line of 18th St., 290 ft.; thence south parallel with the east line of Linwood Boulevard to the north line of 18th St.; thence west along the north line of 18th St. to place of beginning 1198.33.

A tract of land situated in the northeast quarter of Section 25, T. 12 N., R. 4 W., I. M., described as follows: Commencing at the southeast corner of 18th St. and Linwood Boulevard; thence south along the east line of Linwood Boulevard 150 ft.; thence east parallel with the south line of 18th St. 290 ft.; thence north parallel with the east line of Linwood Boulevard 150 ft. to the south line of 18th St.; thence west along the south line of 18th St. to place of beginning 1211.52.

A tract of land situated in the northeast quarter of 17th St. and Linwood Boulevard; thence north along the east line of Linwood Boulevard 150 ft.; thence east parallel with the north line of 17th St. 290 ft.; thence south parallel with the east line of Linwood Blvd. 150 ft. to the north line of 17th St. to place of beginning 1217.64.

37	Linwood Place	.....	1	662.29
"	"	.....	2	636.44
"	"	.....	4	137.58
"	"	E. ½ of.....	5	68.79
"	"	.....	3	678.04
"	"	E. ½ of.....	12	70.58
"	"	.....	13	141.15

344 A tract of land situated in the northeast quarter of Section 25, T. 12 N., R. 4 W., I. M., described as follows: Commencing at the southeast corner of 17th St. and Linwood Boulevard; thence south along the east line of Linwood Boulevard 150.175 ft.; thence east parallel with the south line of 17th St. 290 ft.; thence north parallel with the east line of Linwood Blvd. 150.175 ft. to the south line of 17th St.; thence west along the south line of 17th St. to place of beginning ..... 1211.18.

A tract of land situated in the northeast quarter of Section 25, T. 12, N., R. 4 W., I. M., described as follows: Commencing at the northeast corner of 16th St. and Linwood Boulevard; thence north along the east line of Linwood Boulevard 150.175 ft.; thence east parallel with the north line of 16th St. 290 ft.; thence south parallel with the east line of Linwood Boulevard to the north line of 16th St. to place of beginning. 1173.77

36 Linwood Place		1	684.18
"	"	2	630.91
"	"	4	142.54
"	"	E. ½ of 5	71.27
"	"	8	644.64
"	"	14	100.16
"	"	15	100.16
Oklahoma Railway right-of-way			12046.16
Oklahoma City			1389.33

345 Section 2. That the assessments hereby levied against said several lots and tracts of land, shall bear interest from the date of the passage of this ordinance at the rate of seven per cent per annum, and said assessments shall be payable in ten equal annual installments. The first of such installments, with interest to that date on the whole assessment shall be payable on the first day of September, 1912, and one installment thereof, with interest on the whole amount remaining unpaid, to said date respectively, shall be payable on the first day of September of each year with 1913 to 1921, inclusive; Provided, however that the owners of any of the lots and tracts of land so assessed, shall have the privilege of paying the whole amount of their respective assessments within thirty days from the date of the passage of this ordinance, without interest.

Section 3. That this ordinance shall take effect and be in force from and after its passage, approval and publication, according to law.

Passed and approved Dec. 11th, 1911.

WHIT M. GRANT,
Mayor.

Attest:

[SEAL.] C. R. GOUCHER,
City Clerk.

346 (Commissioners Journal #1, Page 561.)

OKLAHOMA CITY, OKLA., —— 16, 1911.

The Board of Commissioners of the City of Oklahoma City met in Regular Session at 2 o'clock P. M. with Mayor Grant and following Commissioners present: Blackwelder, Hampton, Highley, and Trueblood.

Resolution was read authorizing and providing for the issuance of Street Improvement Bonds for the Paving of Linwood Boulevard from the center line of 16th Street to the east line *fo* Grand Boulevard, in Oklahoma City, Oklahoma.

Moved by Mr. Blackwelder, seconded by Mr. Trueblood that the Resol*y*tion be adopted as read. Motion was then read and adopted by the following roll call vote: Ayes, Grant, Blackwelder, Hampton, Highley and Trueblood.

347 *Resolution.*

Providing for the issuance of bonds for the payment of the contract price for the improvement of Linwood Boulevard from the center line of Sixteenth street to the east line of Grand boulevard.

Whereas, By Ordinance No. 1598, passed December 11, 1911, the Board of Commissioners levied assessments in the aggregate amount of $58,673.23 against the several lots and tracks of land benefit*t*ed by the improvement of Linwood Boulevard from the center line of Sixteenth Street to the east line of Grand Boulevard, in Oklahoma City, Oklahoma, in accordance with the appraisement and apportionment heretofore confirmed against said lots and tracts of land,

Whereas, more than thirty days have expired since the date of the passage of said Ordinance No. 1598, and

Whereas, the aggregate amount of such assessments remaining unpaid is $58,673.23, Now Therefore:

Be it Resolved by the Board of Commissioners of the City of Oklahoma City, State of Oklahoma.

Section 1. That for the purpose of paying the contract price and other expenses of the improvement of Linwood Boulevard from the center line of Sixteenth Street to the east line of Grand Boulevard, in said city, there be issued a series of bonds in the aggregate amount of $58,673.23.

Section 2. Said bonds shall bear date Dec. 26, 1911, One Hundred and Ten bonds shall be of the denomination of $500.00 each;
348 nine bonds shall be of the denomination of $367.32 each, and one bond shall be of the denomination of $367.35, to be numbered consecutively in order of maturity from one up, and one-tenth in amount of said serie*d* of bonds with interest upon the whole series to that date shall be payable on the 15th day of September, 1912, and one-tenth thereof with the yearly interest upon

the whole amount remaining unpaid shall be payable on the 15th day of September in each succeeding year until all shall be paid; the form of such bonds approved by the Contractor is attached to this Resolution, made a part hereof, and marked "Exhibit A."

Section 3. Said bonds shall bear interest at the rate of six per cent per annum from their date until maturity, payable annually and ten per cent from maturity until paid, and shall be designated as "Street Improvement Bonds," and shall constitute Series No. 267.

Section 4. Said bonds shall be signed by the Mayor and attested by the City Clerk of said city, shall have the impression of the corporate seal of said city thereon, and the several installments of interest shall be evidenced by coupons attached bearing a facsimile of the signatures of the Mayor and City Clerk, and shall be payable at the office of the City Treasurer of said city, in Oklahoma City, Oklahoma.

Section 5. The Mayor and Clerk of said city are hereby authorized and directed to prepare and execute said bonds, and when the
349 same shall have been executed, registered and certified and by the City Clerk, they shall deliver the same to The Severns Paving Company, the contractor making said improvement, at par value of the amount due it on its said contract.

Adopted January 16th, 1912.

Approved by the Mayor this 16th day of January, 1912.

WHIT M. GRANT,
Mayor.

Attest:

[SEAL.] C. B. GOUCHER,
City Clerk.

350 United States of America,

State of Oklahoma,

City of Oklahoma City,

Street Improvement Bonds.

Series No. 267.

No. —. $.—.

Know All Men by These Presents: That the City of Oklahoma City, a duly organized city of the first class in the State of Oklahoma, for value received, hereby acknowledges itself indebted to and promises to pay to bearer the sum of —, with interest on said sum from date hereof until maturity at the rate of six per cent per annum, payable annually, on the fifteenth day of September in each year, as evidenced by and upon the surrender of the annexed interest coupons, as they severally become due, and ten per cent from maturity until paid, both principal and interest of this bond are payable in lawful money of the United States of America, at the office

of the City Treasurer of Said City in Oklahoma City, Oklahoma.

This bond is one of a series of like date and tenor excepting as to maturity and amount, numbered consecutively from one to One Hundred and Twenty, inclusive, constituting Series No. 267, aggregating $58,673.23, issued for the improvement of Linwood Boulevard, in said city, and is pay-ble solely from assessments which have been levied upon the lots and tracts of land benefitted by said improvements under authority of act entitled "An Act to provide for the improvement of streets and other public places within cities of the first class by grading, paving, macadamizing, curbing, guttering and draining the same, and declaring an emergency", approved April 17th, 1908. This bond is issued under authority of
351 said Act of April 17th, 1908, and a Resolution duly and regularly adopted by the Board of Commissioners of said city on the 16th day of January, 1912.

And it is hereby certified, recited and declar-d that this series of bonds does not exceed the aggregate amount of said assessments, remaining unpaid; that all acts, conditions and things necessary to be done precedent to and in the issuing of this bond in order to make it legal, valid and a binding obligation, have been done, happened, and performed, in regular and due form, as required by the laws and the Constitution of the State if Oklahoma; that all acts, conditions and things necessary to be done to secure the prompt payment of this bond and interest as they mature will be done, and the faith, credit, revenue and property of said city are hereby irrevocably pledged for the purpose of carrying out each and every stipulation contained herein.

In witness whereof the City of Oklahoma City, by its Board of Commissioners has caused this bond to be signed by the Mayor and attested by the City Clerk of said city, under the corporate seal of said city, and each of the coupons hereto attached to bear a facsimile of the signatures of said Mayor and City Clerk as of the Twenty-sixth day of December, 1911.

WHIT M. GRANT.
Mayor.

Attest:
C. R. GOUCHER,
City Clerk.

352 *Coupon.*

No. —.

September 15th, —, the City of Oklahoma City in the State of Oklahoma, will pay to the bearer — Dollars and — cents, lawful money of the United States of America, at the office of the City Treasurer of said City, in Oklahoma City, Oklahoma, being — interest then due and payable on Bond No. — Series No. 267, issued under date of December 26th, 1911, and is payable solely from as-

sessments which have been levied upon lots and tracts of land benefitted by the improvements recited in said bond.

WHIT M. GRANT,
Mayor.

Attest:
C. R. GOUCHER,
City Clerk.

353 STATE OF OKLAHOMA,
County of Oklahoma, ss:

(To be printed upon the back of each bond.)

I, City Clerk of the City of Oklahoma City, in the County and State of aforesaid, do hereby certify that this bond has been registered by me in a book for that purpose.

In testimony whereof I have hereunto subscribed my name and affixed the corporate seal of said city on the — day of ——, 19—.

C. R. GOUCHER.
City Clerk.

354 STATE OF OKLAHOMA,
County of Oklahoma, ss:

I, City Treasurer of the City of Oklahoma City, in the County and State aforesaid, do hereby certify that this bond has been registered by me on the — day of ——, 19—, in Book No. —, Page —.

In testimony whereof I have hereunto subscribed my name and official title this — day of ——, 19—.

——— ———,
City Treasurer.

355 STATE OF OKLAHOMA,
County of Oklahoma, ss:

I, C. R. Goucher, the duly appointed, qualified and Acting City Clerk of the City of Oklahoma City, do hereby certify that the above and foregoing is a true and correct copy of all Resolutions, Notices, Contracts and Bond, Ordinances, Council and Commissioner Proceedings, Etc., as same appear of Record in My Office for the Paving of the Street as described in the above and foregoing Abstract of Proceedings.

Witness my hand and official seal this 17th day of January, 1912.

C. R. GOUCHER.
City Clerk.

356 Plaintiff's Exhibit B-13793, referred to above offered and admitted in evidence over the objection of the defendant,

Oklahoma Railway Company, is in words and figures as follows, to-wit:

OKLAHOMA CITY, OKLA., April 26, 1913.

To the Honorable Commissioners of the City of Oklahoma City:

GENTLEMEN: On the 31st day of May, 1911, the Severns Paving Company entered into a contract with the City of Oklahoma City, Oklahoma, for improving Linwood Boulevard, in said city, from the center line of Sixteenth Street to the East line of Grand Boulevard, in the manner and upon the terms and conditions specified in said contract.

Through the paving covered by said contract, the Oklahoma Railway Company owns a strip of land, and did own said strip at that time.

Thereafter, in making the assessment against the owners of the abutting property to cover cost of said improvement, a blanket assessment was levied against the Oklahoma Railway Company's right of way in the sum of $12,046.16 and paving bonds were issued by the city against said assessment, as well as against the assessments against the other owners of the abutting property.

The Severns Paving Company respectfully shows that said assessment against the Oklahoma Railway Company is insufficient, because not levied in the proper manner, as said assessment should have
357 been levied against the real estate owned by the said railway company, block by block, as triangular or other irregular shaped lots or tracts, or quarter block by quarter block, as unplatted property, pursuant to the provisions of section 724 of the Compiled Laws of 1909.

On account of the error in levying said assessment the Severns Paving Company, contractor, and at present the owner of the bonds, issued by the city, respectfully requests that the Honorable City Commissioners proceed to cause a new assessment to be made and levied against the land of the Oklahoma Railway Company in the manner provided for levying an original assessment.

SEVERNS PAVING COMPANY,
By CHAS. T. DERR,
Vice-President.

CHAS. T. DERR,
[CORPORATE SEAL.] *Secretary.*

Plaintiff Rests.

Defendants Rest.

Taking of Evidence is Closed.

The Above and Foregoing is and was all of the Evidence Introduced in the Trial of the Cause Numbered 13794, and Entitled Severns Paving Company vs. the City of Oklahoma, et al. in the District Court of Oklahoma County, Oklahoma, at the Trial Thereof on February 20, 1914.

358 In the District Court of Oklahoma County, Oklahoma.

#13794.

THE SEVERNS PAVING COMPANY, a Corporation, Plaintiff,

vs.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, et al., Defendants.

Reporter's Certificate.

Be It Remembered, that on this 20th day of May, 1914, I, Guy G. Fisher, one of the official court reporters in and for the 13th Judicial District of Oklahoma, of which Oklahoma County is a part, do hereby certify that in the trial of the above entitled cause, in said Court, begun and ended on the 20th day of February, 1914, at and under the direction of the Court, I faithfully and accurately reported in shorthand all of the oral testimony, objections and exceptions of counsel, rulings of Court, matters and proceedings had and done therein; that I later extended my shorthand notes so taken, to typewriting, and I also made true and correct copies of all exhibits introduced in evidence in said cause; and I further certify that the above and foregoing transcript is and contains a full, true, correct and complete statement of all such matters and things as aforesaid.

GUY G. FISHER,
Court Reporter.

359 And thereafter, to-wit: March 12, 1914, there was filed in the District Court of Oklahoma County, State of Oklahoma, dated February 28, 1914, a journal entry of judgment in the foregoing entitled cause, which journal entry of judgment was duly entered of record in the Journal of said Court, and is in words and figures as follows, to-wit:

360 STATE OF OKLAHOMA,
Oklahoma County, ss:

In the District Court in and for said County.

No. 13794.

THE SEVERNS PAVING COMPANY, a Corporation, Plaintiff,

vs.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation; Whit M. Grant, Mayor; W. H. Hampton, Commissioner of Public Property; J. T. Highley, Commissioner of Public Safety; Guy E. Blackwelder, Commissioner of Public Work; Elmer C. Trueblood, Commissioner of Accounting and Finance; The Oklahoma Railway Company, a Corporation, et al., Defendants.

Journal Entry.

This cause came on to be heard on Friday, the 20th day of February, 1914, before the Honorable George W. Clark, district judge of said court; and the plaintiff in said cause appearing by Messrs. Ames, Chambers, Lowe & Richardson, its attorneys, and the defendants the City of Oklahoma City, Whit M. Grant, W. H. Hampton, J. T. Highley, Guy E. Blackwelder, and Elmer C. Trueblood appearing by Mr. J. W. Johnson, their attorney, and the defendant the Oklahoma Railway Company, a corporation appearing by Messrs. Asp, Snyder, Owen & Lybrand, its attorneys, and the other defendants appearing not, all parties present announce ready for
361 trial.

Thereupon the evidence of the plaintiff and of the said defendant The Oklahoma Railway Company and that of the said city of Oklahoma City, Whit M. Grant, W. H. Hampton, J. T. Highley, Guy E. Blackwelder and Elmer C. Trueblood was offered and introduced.

Thereupon said cause was set down for oral argument before the court on Saturday, February 28, 1914, being a regular day of the term of said court, the parties appeared by the same counsel as aforesaid, and the said cause was argued to the court by the respective attorneys and thereupon the court finds the issues in said cause in favor of the plaintiff and against the defendants.

The court further finds that on October 11, 1910, the said city of Oklahoma City by its mayor and council regularly passed a resolution to pave Linwood Boulevard, one of the streets of said city throughout its course from the center line of sixteenth street to the east line of Grand Boulevard in said city. That said resolution was duly published and that thereafter the engineer's estimate was duly submitted and approved by the mayor and council of said city. That thereafter at a regular meeting the said mayor and council found that no protests or objections had been filed and by proper

resolution decided to proceed with the improvements in accordance with the original resolution.

362 That thereafter notice was given in due form, of law to paving contractors and that thereafter the above named defendants Whit M. Grant, W. H. Hampton, J. T. Highley, Guy E. Blackwelder and Elmer C. Trueblood having duly succeeded under special charter adopted by said city the preceding mayor and councilmen thereof, said persons succeeding as the board of said city commissioners of said city, having received bids for said improvement, found that the bid of the Severns Paving Company, the plaintiff in said cause, was the lowest and best bid and contract for said paving was duly let to the Severns Paving Company by the unanimous vote of the said mayor and city commissioners and the contract was duly entered into. That thereafter the said paving was completed by the said contractor in accordance with the plans and specifications and estimate of the city engineer, and that prior to the completion of said contract, and to-wit, November 6, 1911, the said Board of Commissioners of the city of Oklahoma City regularly appointed W. O. Knapp, S. A. Calhoun, W. A. McKee three qualified and disinterested freeholders to appraise and apportion the benefits to the several lots, tracts and parcels of land to be assessed and charged with the cost of said improvements. That thereafter and on to-wit, November 20, 1911, the report of the said appraisers having been duly filed with the city clerk the said Mayor and commissioners gave due notice of a meeting to be held for the purpose of reviewing, correcting and adjusting the report of the said board of appraisers. That thereafter at said meeting the said mayor and commissioners

363 of said city finding that no objections or protests had been made to the said appraisers' appraisement and apportionment of benefits, approved of said report. That by the report of the said board of appraisers as reviewed and approved and confirmed by the mayor and commissioners of the city the sum of Twelve Thousand and Forty-six and 16/100 ($12,046.16) Dollars was found to be apportioned to the benefits for said improvement district, which should be assessed against the private right of way of the said defendant the Oklahoma Railway Company.

That thereafter and on December 4th, 1911, the said mayor and said commissioners of the city of Oklahoma City passed an ordinance levying an assessment against the property liable *et* assessment for the cost of paving and otherwise improving said Linwood Boulevard, which said ordinance is number 1598 and is entitled "An Ordinance to assess the cost of street improvements in street improvement district of Linwood Boulevard from the center line of 16th Street to the East line of Grand Boulevard in Oklahoma City, Oklahoma, against the said several lots and tracts of land in said street improvement district", and by said ordinance it was provided that the said assessments should bear interest from December 11th, 1911, at the rate of seven per cent per annum, and said amounts assessed should be payable in ten equal annual installments, the first payable on September 1, 1912, and one installment thereof with interest on the

whole amount remaining unpaid respectively should be pay-
364 able on September 1, 1913, to 1921 inclusive, which said ordinance was duly published as required by law.

The court further finds that all of the proceedings, resolution, actions or the mayor and city council of the mayor and city commissioners up to and including the ordinance levying the assessment were regular, and in accordance with law; in all respects except that the property of the said defendant Oklahoma Railway Company was not described with sufficient accuracy to sustain the levy of said assessment and that said assessment is invalid and insufficient as an assessment against the property of the Oklahoma Railway Company subject to said assessment and that in respect to the said assessment against the said Oklahoma Railway Company, it is the duty of the city mayor and the city commissioners of the city of Oklahoma to reassess the same as provided by law.

The court further finds that the said defendant the Oklahoma Railway Company, a corporation, is the owner of a private right of way lying between the two driveways of the said Linwood Boulevard in said city which said private right of way extends through the center of said Blvd. from the center line of 16 street at its intersection with Linwood Boulevard in said City throughout and along the course of said Linwood Boulevard, to the east line of Grand Boulevard, where it intersects with Linwood Boulevard in said city. That said private right of way is occupied by the tracks, poles and appurtenances of the said defendant Oklahoma Railway Company and that the general public are excluded from said private right of way, except at street intersections, by a curbing installed by the said Oklahoma Railway Company from four to six inches high
365 along the outer boundaries of said private right of way, except at street intersections. That through this portion of said Boulevard said private right of way is forth feet in width, and that said private right of way fronts and abuts upon said improvement and is and was subject to assessment for its just proportion of the cost of said improvements which said sum has been fixed by the said board of appraisers and mayor and city commissioners of the said city of Oklahoma City at the sum of $12,046.16, with interest thereon from January 23, 1912, at the rate of seven per cent per annum, payable in installments as aforesaid.

The court further finds that said private right-of-way should be re-assessed by the said mayor and the city commissioners of the city of Oklahoma City for the said sum apportioned against it as aforesaid.

It is therefore ordered, adjudged and decreed by the court that said Whit M. Grant, as mayor, W. H. Hampton, Commissioner of Public Property; J. T. Highley, commissioner of Public Safety; Guy E. Blackwelder, Commissioner of Public Work, and Elmer C. Trueblood, Commissioner of Accounting and Finance, of the city of Oklahoma City, Oklahoma, be and they are hereby commanded to re-assess against the said private right of way of the Oklahoma Railway Company by a proper description the said sum of $12,046.16, together with interest thereon from December 11, 1911, at the rate of seven per cent per annum, payable in installments as provided

by the said ordinance numbered 1598, and that they take such steps as may be necessary to properly re-assess said property of the said defendant the Oklohoma Railway Company.

To all of which findings, conclusions, orders and judgment said defendant the Oklahoma Railway Company excepts.

Ordered, adjudged and decreed in open court on this the 28th day of February, 1914.

GEO. W. CLARK,
District Judge.

Endorsements: District Court, Oklahoma County. No. 13,794. The Severns Paving Company, a corporation, Plaintiff, vs. The City of Oklahoma City, a municipal corporation, et al., Defendants. Journal Entry. Filed in District Court, Oklahoma County, Oklahoma. March 12, 1914. Thos. E. Kirby, Clerk. By H. W. Garson, Deputy.

And thereafter, to-wit: March 3, 1914, there was filed in the District Court of Oklahoma County, State of Oklahoma, the defendant Oklahoma Railway Company, herein, its motion for new trial in the foregoing entitled cause, which motion for new trial, together with the endorsements thereon, is in words and figures as follows, to-wit:

STATE OF OKLAHOMA,
Oklahoma County, ss:

In the District Court in and for said County and State.

No. 13794.

THE SEVERNS PAVING COMPANY, a Corporation, Plaintiff,

vs.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, et al., Defendants.

Motion for New Trial.

Comes now the Oklahoma Railway Company, a corporation, one of the defendants in the foregoing and numbered and entitled cause, and moves and applies to the court to grant to it, a party aggrieved, a new trial in the same for the following causes and each of them, affecting materially the substantial rights of defendant, the said Oklahoma Company, a corporation:

1st. Irregularity in the proceedings of the court, and abuse of discretion, by which it, the said Oklahoma Railway Company, was prevented from having fair trial.

2nd. Excessive damages, appearing to have been given under the influence of passion and prejudice.

3rd. Error in the assessment of the amount of recovery the same being too large.

369 4th. That the verdict and decision is not sustained by sufficient evidence, and is contrary to law.

5th. Errors of law occurring at the trial and excepted to by said defendant.

ASP, SNYDER, OWEN & LYBRAND,
Att'ys for Defendant, Okla. Railway Co.

Endorsement: In the District Court of Oklahoma County, State of Oklahoma. No. 13794. The Severns Paving Company, a corporation, Plaintiff, vs. the City of Oklahoma City, a municipal corporation, et al. Defendants. Motion for a New Trial. Filed in District Court of Oklahoma County, Oklahoma, March 3, 1914. Thos. E. Kirby, Clerk. By H. W. Garrison, Deputy. Asp, Snyder, Owen & Lybrand, Att'ys for Okla. Ry. Co.

370 And thereafter, to-wit: March 12, 1914, there was filed in the District Court of Oklahoma County, State of Oklahoma, with the clerk thereof, and duly entered and recorded in the journal of said court, an order overuling defendant Oklahoma Railway Company's motion for new trial in the foregoing entitled cause, and granting an extension of time within which to prepare and serve case-made therein, which order, together with the endorsements thereon, is in words and figures as follows, to-wit:

371 In the District Court of Oklahoma County, Oklahoma.

#13794.

THE SEVERNS PAVING COMPANY, a Corporation, Plaintiff,

v.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, et al., Defendants.

Order.

Now on this 12th day of March, 1914, the same being a judicial day of the regular January, 1914 Term of the above named court, this cause came regularly on to be heard upon the motion for new trial filed by the Oklahoma Railway Company, one of the defendants herein; plaintiff being represented by its attorneys, Ames, Chambers, Lowe & Richardson, and said defendant, Oklahoma Railway Company, appearing by its attorneys, Asp, Snyder, Owen & Lybrand; whereupon the motion for new trial above mentioned was presented and duly considered by the Court, and after being fully

advised in the premises the Court is of the opinion that said motion is not well taken and should be, in all things, overruled and denied.

It is, therefore, ordered, adjudged and decreed by the Court, on the date aforesaid, that the motion for new trial of the Oklahoma Railway Company, defendant herein, be, and the same is, hereby, as to all of the grounds set up therein, overruled and denied, to which ruling and order said defendant, at the time, and still excepts; thereupon said defendant praying an extension of time from and after the statutory time allowed for the preparation and service of case-mades in such cases made and provided, it is granted an extension of Sixty days' time from and after such statutory time,
372–377 within which to make and serve a case-made in said cause; plaintiff, Severns Paving Company, is granted and allowed ten days thereafter in which to suggest amendments thereto; said case-made to be signed and settled upon the giving of five days' notice in writing by either party to the adverse party; and the judgment rendered in said cause is to be staid, without bond, for a period of seventy-five days from and after this date, conditioned upon the filing of said case-made in the Supreme Court of Oklahoma on or before the expiration of said period.

(Signed) GEO. W. CLARK,
District Judge.

Endorsements: #13793. Severns Paving Co. vs. The City of Oklahoma City. Order. Filed March 12, 1914. Thos. E. Kirby, Clerk, by H. W. Garrison, Deputy.

* * * * * * *

378 Be It Known that heretofore to-wit, on the 9th day of October, 1917, the Supreme Court of the State of Oklahoma entered a Journal Entry Order herein, affirming the judgment of the trial court herein, which said Order is in words and figures as follows, to-wit:

379 Supreme Court, October Term, 1917, October 9th, 1917, First Judical Day.

No. 6778.

OKLAHOMA RAILWAY CO.

vs.

SEVERNS PAVING CO. et al.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby affirmed.

Opinion by Owen, J.

All the Justices concur, except Kane, J. who dissents.

380 Be it known that heretofore, to-wit, on October 9th, 1917 the Supreme Court of the State of Oklahoma rendered an opinion herein affirming the judgment of the trial court, and a Petition for Rehearing and Answer thereto being duly filed, a Journal Entry Order was made on December 4th, 1917, withdrawing, modifying and refiling said opinion. Said Order and Opinion being in words and figures as follows, to-wit:

381 Supreme Court, October Term, 1917, December 4th, 1917, Twentieth Judicial Day.

No. 6778.

OKLAHOMA RY. CO.

vs.

SEVERNS PAVING CO. et al.

And now on this day the opinion heretofore filed in the above cause is withdrawn for modification, is modified and as so modified is hereby ordered refiled.

382 Corrected and Refiled Dec. 4, 1917.

In the Supreme Court of the State of Oklahoma.

No. 6778.

OKLAHOMA RAILWAY CO., Plaintiff in Error,

vs.

SEVERNS PAVING CO. and THE CITY OF OKLAHOMA CITY, Defendants in Error.

Filed Oct. 9, 1917. William M. Franklin, Clerk.

Syllabus.

1. Where a contract for street paving has been let by municipal authorities, mandamus will lie to compel a re-assessment of property liable for the cost of the improvement where the assessment is void only for lack of proper description of the property, the provisions of

the statute requiring assessment by proper description being mandatory.

2. Under Sec. 7, Art. 9, of the Constitution all real and personal property, or any part thereof, belonging to public service corporations, including street railways, is liable to execution and sale in the same manner as the property of individuals.

3. Under Rev. L., 1910, Sec. 511, which provides that when a plat of any addition to a city shall have been recorded, every grant or donation to any corporation shall be deemed in law a sufficient conveyance to vest the fee simple of such land, and shall be considered to all intents and purposes a general warranty, and Sec. 1175, which provides that every estate in land conveyed shall be deemed an estate in fee simple unless limited by express words, and Sec. 1382, which confers on railway corporations power to take a fee title to land purchased for right-of-way purposes, a voluntary grant or donation of land to a railway company vests it with an estate in fee, although the dedication was for railway purposes only.

383 4. A tract of land 40 feet in width along the center of a city boulevard, and from which the general public are excluded by a six inch curbing, the title to which the railway company holds by voluntary conveyance purporting to convey the fee, is a "lot, piece, or parcel" of land fronting and abutting upon the boulevard, within the meaning of the statute, and subject to assessment for the cost of paving said boulevard.

5. The doctrine of res judicata cannot be applied to judgments or decrees which merely interpret general statutes, and the obligations of citizens under them, except in so far as such judgments or decrees involve findings of fact to which such interpretation has been applied.

Error from the District Court of Oklahoma County.

Hon. George W. Clark, Judge.

Affirmed.

Shartel, Dudley & Shartel, Asp, Snyder, Owen & Lybrand, Attorneys for Plaintiff in Error.

Ames, Chambers, Lowe & Richardson, B. D. Shears, E. E. Blake, A. F. Boys, F. N. Watson, Attorneys for Defendants in Error.

Opinion of the Court by

OWEN, *J.*:

This action was brought, in the District Court in Oklahoma County, by the Severns Paving Co. against the City of Oklahoma City and the Oklahoma Railway Co. for a Writ of Mandamus to require the city commissioners to re-assess the private right-of-way of the railway company along the center of Linwood Boulevard to pay a proportionate part of the cost of paving said Boulevard. Judg-

ment below was for the paving company. The railway com-
384 pany brings the case here.

The questions involved are: (1) Whether Mandamus will lie, and (2) whether the private right-of-way of the railway company is subject to assessment to pay the cost of paving said Boulevard.

It appears the railway company is the owner of a private right-of-way, 40 feet in width, extending along the center and between the two driveways of this boulevard. The tracks and poles of the company are along the center of this tract. The general public are excluded from this right-of-way, except at the street intersections, by a curbing installed by the railway.

It is urged that the writ was erroniously issued because it deprives the railway company of the right to be heard in violation of Federal and State Constitutions, and because it attempts to control discretion.

After the mayor and council, by proper proceedings authorized the paving and let the contract, the railway company still had the right to be heard as to the amount to be properly assessed and apportioned against its property. The statute requires the appointment of appraisers to appraise and apportion the benefits to lots and tracts of land designated by council. The appraisers make written report which is filed with the city clerk. When the report is filed the statute requires the mayor and council to appoint a time for holding a session to hear any complaint or objections that may be made to this report concerning the assessment and apportionment, and notice of such session is required to be published. Sec. 644, of the Statute, Rev. L., 1910, provides that in the event any special assessment shall be found to be invalid, for any reason whatsoever, the city council may, in the manner provided for levying an original assessment, proceed to cause a new assessment to be made. Thus it will be seen
that when the commissioners proceed in obedience to the de-
385 cree of the court to re-assess the property of the railway company an opportunity will be given the company to be heard and to complain or object to the amount of the assessment.

The lower court found that the assessment made by the appraisers was invalid and insufficient as an assessment against the property of the railway company for the reason that it was made against the company and the property subject to assessment was not described with sufficient accuracy. The writ commanded the city commissioners to reassess this right-of-way by proper description. After the determination to make the improvements and letting of the contract, no discretion of any kind is vested in the mayor and commissioners so far as making the assessment is concerned. The provisions of the statute requiring the appointment of appraisers to appraise and apportion the benefits to the several tracts of land within the improvement district, and the making of such appraisement and apportionment, are mandatory. City of Norman vs. Allen, 47 Okla. 74, 147 Pac. 1002; El Reno vs. Paving Co., 25 Okla. 648, 107 Pac. 163. The lower court found that all of the proceedings, resolutions and actions, of the mayor and city council up to and including the ordinance levying the assessment were regular and in accordance with law in all respects, except that the

property of the railway company was not described with sufficient accuracy to sustain the assessment against the company. In appointing the appraisers and in describing the property subject to assessment no discretion is vested in the municipal authorities, therefore the writ in directing the authorities to re-assess the property by proper description does not seek to control any discretion. The writ does not seek to control as to the amount of the assess-
386 ment, but only as to the description of the property.

Counsel urge in support of the contention that the strip of land in question is not subject to assessment for street improvement: (1) The limit of the burden which the statute permits to be imposed upon the railway company with respect to paving is to require it to pave between the tracks and a narrow space on either side of same, as provided by Sec. 722 Rev. L., 1909, the franchise ordinance of the city, and the dedication of such private right-of-way; (2) the right-of-way of the railway company in the street does not come within the expression, "lots, pieces, or parcels of land fronting and abutting upon the improvement," within the meaning of the statute: (3) the right-of-way of the railway company is a part of the street and cannot "abut" upon the street; (4) if the statute imposes a lien upon a portion of the road-bed and right-of-way of the railway company, it is void as against public policy which forbids the breaking up of a system and the crippling of public service corporations; (5) the private right-of-way in question is not susceptible to benefits within the meaning of the Constitution and Statutes of the State, and under the evidence offered is not benefitted by the improvement; (6) the decision of the United States District Court in the case of Oklahoma Railway Co. vs. City of Oklahoma City is res judicata.

The section of the statute, as well as the ordinance and deed of dedication, referred to under the first proposition urged, and the authorities cited by counsel in support of this proposition, have reference to street paving along the surface of which the tracks of the railway company are laid, and the space actually occupied as a right-of-way over which the railway company has an easement only. They have no application to a private right-of-way 40 feet in width in which the railway company owns the fee, and
387 along the center of which the tracks are laid. In the case of Oklahoma City vs. Shields, 22 Okla. 265, 100 Pac., 559, in discussing the assessment against the right-of-way of a railroad it was said:

"These railroad companies do not own their several rights-of-way, but simply occupy them and have easements therein obtained from the public. If in any case they have purchased and own the land occupied by and adjoining the right-of-way, there is no reason why in such cases the assessments should not be made against the land so owned, and in this event the plan of assessment would be the same as against the individual—the natural person. This rule applies equally to street railways who own any portion of their right-of-way and abutting lands."

The fee title to the strip of land in question here appears to be in the railway company. In the dedication to the city this strip was referred to in the following language:

"Said strips of land are not set aside for the exclusive use of and dedicated to the Oklahoma City and Suburban Railway, its successors and assigns, with like effect as though deeded and conveyed to said company in fee simple by separate deed."

There is no merit in contentions two and three, that the 40 foot strip of land in question does not come within the expression, "lots, pieces, or parcels of land, fronting and abutting upon the improvement," within the meaning of the statute. The argument made in support of these contentions is to the effect that the tract being within the boundaries of the boulevard, it cannot be said to "front" or "abut" upon the improvement, that being a part of the street it cannot be said to "abut" upon the street; that the railway company's interest is only an easement in the street. While this strip is along the center of the boulevard, it is in fact no part of the highway so far as the use of the public is concerned. It is separated from the highway portion of the boulevard, and the public is excluded from the use of it by a six inch curbing. By this curbing, as well as by the terms of the dedication, this strip is reserved for the exclusive use of the railway company. It is no part of the street, in the sense urged by counsel. It is not a public highway. In the case of Arnsperger vs. Crawford, (Md.) 70 L. R. A. 497, it was said:

"When the road, after being laid out, becomes the property of the applicant, from which he may lawfully exclude the public, then the use is strictly private."

It is said by this court in the case of St. L. & S. F. R. Co. vs. Smith, —.

388 "A public highway, as distinguished from a private road, is one which is open to the travel of the public."

In the case of Figg vs. L. & N. R. Co., 75 S. W. Rep. 269, the Court of Appeals of Kentucky said:

"A strip of land appropriated to use by a railroad as a right-of-way, and which is a "lot," within the meaning of the statute governing street improvements, is liable to an assessment for a street improvement."

In the same case it was also said:

"It is insisted on behalf of the railroad company that (1) the property sought to be subjected to part of the cost of street improvement is only a right-of-way, and therefore cannot be charged therewith; (2) it receives no benefit from the improvement; (3) the right-of-way is not a lot, in the meaning of the statute governing street improvements. * * * The court concludes that its use of its right-of-way will be perpetual. It is therefore practically the owner of the land. If this strip of land was not occupied by the railroad company as a right-of-way, it would not be suggested that it was not subject to the special tax for street improvement. The

purpose for which the lot is used cannot affect the question of its liability for the cost of street improvement."

By the terms "fronting and abutting" as used in the statute, is meant that between which and the improvement there is no intervening land. 25 Am. & Eng. Ency. Law, (2nd. Ed.) 1190, 124 N. W. Rep. 766. The cases relied upon by counsel in support of this contention appear to turn on the proposition that the railroad right-of-way being a part of the street, and used by the public, cannot be said to "abut" upon the street. In the case of S. P. C. vs. C. B. & Q. R. Co., 107 Ill. 105, cited by counsel, the question was whether, the right-of-way of occupancy, franchises, property and interests of the railway company in Michigan Ave., are, within the meaning of the statute, contiguous property abutting upon such avenue.

In that case the Court said:

"And as a street cannot in the nature of things abut on itself, and as mere intangible rights or privileges, for the same reason, are incapable of abutting on anything, it is clear the assessment was unauthorized."

Another case relied on is that of Davis vs. Newark, 54 N. J. L., 144, 23 Atl., 276, in which it was said:

389 "It appears, however, that the strip of land thus owned has been dedicated to public use as a highway, and forms part of the avenue."

The railway company here holds an entirely different estate. Its right is not merely an intangible privelege or an easement but under the terms of the dedication is a fee simple title. Under the provisions of Sec. 511, Rev. L. 1910, the terms of the dedication is to all intents and purposes a general warranty and sufficient conveyance to vest the fee simple of the lands described therein. Under Sec. 1175 of this statute every estate in land conveyed by deed shall be deemed an estate in fee simple, unless limited by express words. Under Sec. 1382 of this statute authority is given to the railway company to acquire land and to sell the same when no longer necessary to its use. In construing these provisions of the statute this Court, in an opinion by Mr. Justice Turner, in the case of M. K. & T. Ry. Co. vs. City of Tulsa, 45, Okla. 382, 145 Pac. 398, held that the railway company took the fee to the right-of-way under a general warranty deed. The United States Circuit Court of Appeals in the case of Gilbert vs. M. K. & T. Ry. Co., 185 Fed. 102, held to the same effect.

In the case of City vs. Electric Co., 94 Pac. 194, relied upon by counsel, the Court said:

"The respondent's right in the street is in no sense a lot, block, or parcel of land. It neither owns the fee of the street over which its tracks are laid and its cars are operated, nor does it have dominion or control over that portion of the street. On the contrary, the fee of the street rests in the abutting property holders to whom it will revert when the interests of the public therein cease

from any cause, and a dominion and control over it is vested in the public authorities, in whom it will remain as long as the street retains its public character."

The dominion and control of the strip of land in question here is not in the city authorities. If the street should be vacated by the city authorities this private right-of-way would not revert to the abutting owners but would continue to be the property of the railway company. The company took the fee from the original
390 grantors by the dedication before the abutting owners acquired their titles.

Sec. 7 of Article 9, of the Constitution controls the fourth contention, that the right-of-way of the railway company cannot be assessed. The section reads as follows:

"The rolling stock and all other movable property belonging to any railroad, transportation, transmission, or other public service corporation in this State, shall be considered personal property, and its real and personal property, or any part thereof, shall be liable to execution and sale in the same manner as the property of individuals; and the Legislature shall pass no laws exempting any such property from execution and sale".

It was said in the case of Figg vs L. & N. R. Co., supra:

"The purpose for which the lot is used cannot affect the question of its liability for the cost of street improvement".

It is said in Dillon on Municipal Corporations, Sec. 1451, 4th volume:

"According to the view very generally held, land occupied and used by railroad companies for roadbeds, depots, freight houses and other corporate purposes, whether the company be owner of the fee or has only an easement or qualified right therein, is to be regarded as real estate, which may be subjected by the Legislature to special assessment for the opening, paving and grading of streets and for other local improvements in the same manner as the real property of private individuals. But this view is not uniformly accepted."

In the case of E. H. & C. R. Co. vs. City of Jackson, (Miss.) 51 So., 802, it was said:

"In the absence of any special provision in the charter of the street railway company requiring it to share its burden of paving the street which it occupies with its road, it is well settled by the weight of authority that the street railway company, as well as any property owner on the street, may be required to pay its pro rata part of the cost. It may be that the character of property belonging to the street railway is somewhat different from that of an abutting owner, but that a street railway company has property rights in a street which are subject to local assessment is supported by an almost unit of authority. They are abutting property owners in the sense of local assessment laws. They make a higher and a different use of

the street from that of any other occupant of same. Their franchise is valuable, and often exclusive. Gray's Limitation on Taxing Power, Secs. 1925-1933."

Other cases in point on this proposition are Heman Const. Co. vs. Wab. R. Co. (Mo.) 12 L. R. A. (N. S.) 112; N. Pac. R. Co. vs. City of Seattle (Wash.) 12 L. R. A. (N. S.) 121.

391 We might dispose of the fifth contention, that the private right-of-way in question is not susceptable to benefits and under the evidence offered is not benefitted by the improvement, by saying this is a matter to be determined by city authorities. The Legislature authorized the city authorities to lay out improvement districts and determine when the street should be improved. Sec. 7, Art. 10, of the Constitution reads as follows:

"The Legislature may authorize county and municipal corporations to levy and collect assessments for local improvements upon property benefitted thereby, homesteads included, without regard to a cash valuation."

The right to impose such a tax is based upon a presumed benefit. If a property owner is an abutting owner, he must bear his share of the burden because the Legislature has so directed. In the case of M. K. & T. Ry. Co. vs. City of Tulsa, supra, it was said:

"Whether lots abutting on the street improvement and included in a railroad right-of-way or not have been benefitted by the street improvement is a Legislative question, and, having been settled by the Legislative power of the city is conclusive on us".

This identical question was presented to the Supreme Court of the United States in the case of L. & N. R. Co. vs. Paving Co., 197 U. S. 430. There it was urged that the railroad company was not benefitted. The Court said:

"The amount of benefit which an improvement will confer upon particular land—indeed, whether it is a benefit at all—is a matter of forecast and estimate. In its general aspects, at least, it is peculiarly a thing to be decided by those who make the law. * * * A statute like the present manifestly might lead to the assessment of a particular lot for a sum larger than the value of the benefits to that lot. The whole cost of the improvement is distributed in proportion to area, and a particular area might receive no benefits at all, at least if its present and probable use be taken into account. If that possibility does not invalidate the act, it would be surprising if the corresponding fact should invalidate an assessment. * * * The plea plainly means that the improvement will not benefit the lot, because the lot is occupied for railroad purposes and will continue so to be occupied. That, apart from the specific use to which this land is devoted, land in a good sized city generally will get a benefit from having the streets about it paved, and that this benefit generally

will be more than the cost, are propositions which, as we
392 already have implied, a legislature is warranted in adopting.
But, if so, we are of opinion that the legislature is warranted in going one step further and saying that on the question of benefit or no benefit the land shall be considered simply in its general relations and apart from its particular use". Heman vs. Wab. R. Co. (Mo.) 12 L. R. A. (N. S.) 112; N. Pac. R. Co. v. City Seattle (Wash.) 12 L. R. A. (N. S.) 121.

To the same effect is the case of Appeal of N. B. & M. R. Co., 32 Calif. 500, in which the Court said:

"But whether the result anticipated will be realized is not a question for us. The jurisdiction and the duty to determine whether the public wants demanded, and whether the benefits likely to result would be sufficient to justify the expenditure, was devolved by law, under prescribed restrictions, upon the Board of Supervisors. That question they have determined."

The sixth proposition urged that the decision of the United States District Court in the case of Oklahoma Railway Co. vs. The City of Oklahoma City in res judicata has no application. While it is true that the railway company and the city *were* both were parties to that action as well as this, the paving company here was not a party there, and the issues there were not identical with the issues here. In that case issues were presented which do not arise in this case. But if it be said that the judgment of that court was to the effect, that under the statute and ordinances of the city lands belonging to the railway company similarly situated to the land in question are not subject to assessment, the doctrine of res judicata cannot apply. This doctrine cannot be applied to judgments and decrees which merely interpret general statutes, and the obligations of citizens under them, except in so far as the judgment and decree made involves findings of fact to which such interpretation has been applied. 109 Fed. 21:38, Iowa 633.

It is suggested by counsel that this Court should determine by what description the tract of land in controversy should be assessed, that is, whether as a lot, quarter block, or irregular tract. This
question is not properly within the issues presented on the
393 record. It does not appear to have been presented to the trial
court. The contention made by plaintiff below was that the assessment was invalid for the reason that the property was not accurately described. The decree of the trial court sustains this contention and commands the city authorities to re-assess this private right-of-way by proper description, and to take such steps as may be necessary to properly assess said property. The decree does not direct the commissioners as to the description. The judgment of the trial court is affirmed.

All justices concur, except Kane J., who dissents.

394 In the Supreme Court of the State of Oklahoma.

No. 6777. No. 6778.

OKLAHOMA RAILWAY COMPANY, Plaintiff in Error,

vs.

SEVERNS PAVING COMPANY, and the CITY OF OKLAHOMA CITY, Defendants in Error.

Petition for Rehearing.

J. R. Dudley and Kent Shartel, Asp, Snyder, Owen & Lybrand, Attorneys for Appellant.

394a In the Supreme Court of the State of Oklahoma.

No. 6777. No. 6778.

OKLAHOMA RAILWAY COMPANY, Plaintiff in Error,

vs.

SEVERNS PAVING COMPANY, and the CITY OF OKLAHOMA CITY, Defendants in Error.

Petition for Rehearing.

Comes now the Oklahoma Railway Company, plaintiff in error in above numbered and entitled causes, and in each of such causes files this its petition for rehearing, and respectfully moves the court to grant it a rehearing of the above numbered and entitled causes upon each and every of the following grounds, to-wit:

394b First.

The court entirely misconceived the mandamus appealed from. After referring to Section 644, R. L. 1910, providing that in event any special assessment shall be found to be invalid in whole or in part, the city council may in the manner provided for levying an original assessment, proceed to cause a new assessment to be made, the opinion says:

"Thus it will be seen that when the commissioners proceed in obedience to the decree of the court to reassess the property of the railway company an opportunity will be given the company to be heard and to complain or object to the amount of the assessment."

And further says:

"In appointing the appraisers and in describing the property subject to assessment no discretion is vested in the municipal author-

ities, therefore the writ directing the authorities to re-assess the property by proper description does not seek to control any discretion. The writ does not seek to control as to the amount of the assessment, but only as to the description of the property."

From the above quoted statements from the opinion it clearly appears that the writer of the opinion thought that the mandamus only compelled a re-assessment in so far as the description of
394c the property was concerned, and that an opportunity would be permitted the railway company to be heard before the city commissioners and the board of appraisers upon re-assessment, as to the amount of benefits to be assessed. This is distinctly not the case.

Both by the alternative writ and the peremptory writ, the amount to be assessed upon re-assessment is definitely fixed by the court, and the city commissioners of the city are distinctly required, upon re-assessment to assess a certain definitely named sum. The mandamus is copied in our original brief, page 77, the pertinent portion thereof being as follows:

"be and they are hereby commanded to re-assess against said private right of way of Oklahoma Railway Company, by proper description, the said sum of $24,186.37, together with interest thereon from January 23, 1912, at the rate of 7% payable in installments as provided by said ordinance number 614, and that they take such steps as may be necessary to properly re-assess said property of said defendant Oklahoma Railway Company."

The above quoted statements from the opinion filed herein compared with the actual facts as to what the mandamus does require, distinctly disclose the first contention made by the railway
394d company in this cause, to the effect that "this writ erroneously issued because it deprives the railway company of its right to be heard in violation of the Federal and State Constitutions, and because it attempts to control discretion."

The discussion of this subject commences in our original brief, page 73, and counsel are convinced that this case should have gone off on this issue alone without the necessity of passing on any other questions involved. It is true, as stated in the opinion, that after the determination to make the improvements, no discretion is vested in the mayor and commissioners as to whether or not they will proceed with the improvement, but it is not the case under the statute, as is stated in the opinion, "that no discretion of any kind is vested in the mayor and commissioners" because in the same paragraph of the opinion, the court recognizes the fact that discretion is vested as to the fixing of the amount of the assessment, and justifies the mandamus on the theory that it does not control this discretion. But as above said, this justification cannot be made because the very thing the mandamus does is to control discretion as to the amount of the assessment, and it further, in not permitting
394e a hearing as to the amount of the assessment before the commissioners making the re-assessment, deprives the railway

company of any opportunity to be heard on the amount of the assessment, and takes its property without due process of law, due process requiring an opportunity to be heard. The railway company has never had an opportunity to be heard on the question of the amount. It was never properly brought before the city commissioners in the original proceedings. The trial court refused to hear it on the question of the existence or non-existence, or amount of benefits resulting from this improvement, and the order of mandamus cuts off an opportunity for being heard as to amounts on reassessment by the city commissioners. No clear case can be imagined of the taking of property without due process of law, in violation of both State and Federal Constitutions.

The railway company has preserved this question in the record and respectfully urges upon the entire court the consideration of its argument, (Brief p. 73 et seq.) upon this phase of the case, for, in the language of the rules of the court relating to re-hearings, it will appear from such consideration that a "question de-
394*f* cisive of the case and duly submitted by counsel, has been overlooked by the court."

Second.

On page five of the manuscript opinion filed herein the court states, under the six subdivisions, its interpretation of the contentions made by the railway company of the merits. The first of these is,

"(1). The limit of the burden of which the statute permits to be imposed upon the railway company with respect to paving is to require it to pave between the tracks and a narrow space on either side of same, as provided by Sec. 722 Rev. L. 1909, the franchise ordinance of the city, and the dedication of such private right of way."

It is feared that counsel for the railway company have failed to make the position of the railway company clear. This statement of their contentions is so entirely inadequate and the discussion on this point in the opinion, so fails to determine the questions thought to have been presented, that counsel can only consider themselves blame worthy for their failure to present in an understandable way what was to their minds, or the merits, decision against the validity of this assessment.

394*g* In the first place, it was hardly intended to urge that,

"the limit of the burden which the statute permits * * * is to require it to pave between the tracks and a narrow space on either side of the same, as provided by * * * the dedications of such private right of way."

The statute in question, Section 722 Comp. Laws 1909, does not say anything about, or make any provision with reference to the dedication of private rights of way, nor does it make any reference to the "franchise ordinances of the city." The court has attempted

to state in this first summary of contentions what the railway company attempted to present under three separate subdivisions of its brief, and these three contentions relate to three distinct and unrelated conditions of fact and law. The court in attempting to deal with the three together, has altogether, it is with great deference submitted, confused, not only the contentions themselves, but the arguments advanced and cases cited in support of these three unrelated contentions, with the result that perhaps the most decisive features of the merits of the case have been, again to use the language of the rules of this court, "overlooked by the court."

394*h* The three contentions referred to are stated in the brief (page 123, et seq.) as points 1, 5 and 6, and read:

"1. The limit of the burden which the statute permits to be imposed upon the street railway company with respect to paving is that which is specifically imposed by section 722, Comp. Laws, Okla. 1909; and any attempt to impose a different or greater burden is null and void."

"5. In no event can any greater burden with respect to paving be imposed upon the Oklahoma Railway Company than was outlined in the franchise ordinance No. 281 of the city where the entire duty and burden of the railway company with respect to paving is detailed. The imposition of any other or greater burden than that provided for by the franchise is void both under Federal and State Constitutions as impairing the obligations of the franchise contract.

"6. In no event can a greater burden be imposed upon a railway company respecting paving, in so far as its private rights of way are affected, than the burden provided in the several dedications of such private rights of way, such dedications being made when the land in question was farm property, not within the city limits, the area included within such dedication having been subsequently taken into the city with knowledge of the restrictions contained in the plats and dedications, such restrictions and conditions having been the inducement of the railway company to build in these outlying districts, and constituted contracts which would be impaired in violation of both State and Federal Constitutions by the

394*i* imposition of any or other greater burden as to paving than the plats and dedications provide for and require."

The court in its opinion entirely omits to consider the fifth and sixth propositions above quoted, and misapprehends the nature of the argument made under the first. The court says:

"The section of the statute, as well as the ordinance and deed of dedication, referred to under the first proposition urged, and the authorities cited by counsel in support of this proposition, have reference to street paving along the surface of which the tracks of the railway company are laid, and the space actually occupied as a right of way over which the railway company has an easement only. They have no application to a private right of way 40 feet in width in which the railway company owns the fee, and along the center of which the tracks are laid."

In saying that Section 722 Comp. Laws 1909, has reference to street paving along the surface of which tracks of the railway are laid and the space actually occupied as a right of way over which the railway company has an easement only, the court overlooked the fact that by Section 722 Comp. Laws 1909, the burden of the railway company is provided and fixed where its tracks, running in the general direction of such street are "either on or adjacent
394*j* thereto." If the words "on or adjacent thereto," have any meaning at all, they mean on the street or adjacent to the street. Under any theory, the right of way of the railway company is either on the street or adjacent to it. If it is neither, then it cannot under any theory be assessed because it could then be neither on, nor could it abut or be adjacent to the street.

The subject of street surface paving, such as the court refers to in the above portion of its opinion, is dealt with elsewhere in the same section of the statute, viz., in the proviso clause immediately preceding that last above referred to. Probably the court misconceived our contention and thought we were contending that this private right of way was not assessable because of such preceding provision. This is the only possible explanation we can make of the court's statement. But such is not the case. Our claim is that because of the fact that the statute has dealt with and provided the burden of paving which may be imposed upon both a steam and street railway, under the exact physical facts existing in this case, the limit of the burden is that which the statute imposes. The court in its opinion does not deny the principle upon which we rely, but avoids
394*k* the application of that principal by a statement, manifestly inaccurate, that the physical condition existing in this case was not contemplated by the statute, which refers, as the opinion says, "to paving along the surface of the street in which the tracks are laid." But as we have said, the statute provides what the burden of steam and street railways shall be, both when the tracks are laid in the surface of the street, and when they are laid adjacent to the street or improvement.

The first situation deals with the condition that exists, for example, with tracks laid along the middle of Main Street in Oklahoma City; the second, deals with physical conditions such as exist on Linwood Blvd. or Classen Blvd., in Oklahoma City with reference to street railways, and such as would exist if a steam or street railway were laid upon a strip adjacent to and at the Eastern boundary of a street. Under this section the city commissioners, if the power otherwise existed, could have compelled the Oklahoma Railway Company to pave its entire private right of way, instead however, of exercising the power which the statute did give them, and which
394*l* by every known rule of construction of statutes was the limit of its power with respect to this physical situation it tried to do something and to lay the burden entirely beyond its power and authority.

In considering this question it makes no difference whether the Oklahoma Railway Company had a fee or license or an easement, or what the quantum or quality of its estate was. The statute makes

no distinction as to estate by virtue of which the streets or the land adjacent to the street is occupied. It is the physical fact which tests the authority of the city, and by no means the quantum or quality of the estate under which this physical fact existed.

On this question the court cites Oklahoma City v. Shields, 22 Okla. 265, to the effect that where the railway company had purchased and owned the land occupied by them, there is no reason why the assessment should not be made against the land so owned in the same manner as the assessments against natural persons.

The Shields case, as the court will see by reference to the record, was one in which no street or steam railway company was a party; in which the question as to the extent of liability or no steam
394*m* or street railway company was presented to the court. And, when the authority of that case was first called into question in this court in the case of Enid City Railway Company v. Enid, 43 Okla. 788, the court found it necessary to overrule the case as ill considered. (See opinion therein.)

Nowhere in the briefs in the Shields case was there ever presented, and nowhere in the opinion in that case were there ever considered, those provisions of the statute which we have just referred to, or the effect of those provisions. Insofar as the rights of any railway or street railway company was attempted to be decided in the Shields case, it was an ex parte proceeding, both instituted and defended by parties who were interested in getting this court to lay down the principle under which a street railway and a steam railway company could be mulcted. And it is not believed that this Court, when its attention is called, as it is in the original brief in this case (commencing p. 126), to what the actual provisions of the statutes are (which was not a matter considered in the Shields case, will not rely upon the Shields case, which really decided nothing and the judgment which imposed no burden and was ineffectual for all purposes, and the entire of all of which, insofar as it
394*n* attempted to treat with street railways was obiter dicta, and in the opinion in that case was expressly recognized to be obiter dicta, to deprive this Oklahoma Railway Company of its property and its rights.

If the court agrees with us that the physical situation existing in this case was within the terms and provisions of the statute, as that statute existed at the time this paving was done (Sec. 722, Comp. Laws 1909), then not only by the weight of authority, but by the undivided support of all the authorities, the conclusion cannot be resisted by the court that the city was without power to assess this property in the manner sought to be done.

It is therefore most urgently requested that the cause be reheard with regard to the first contention made by the railway company, because a question decisive of the case, and submitted by counsel, has been overlooked by the court, as will be seen by an inspection of the opinion filed herein, compared with the arguments made and authorities cited from pages 126 to 155 of the brief of the Railway Company filed herein.

394o

Third.

The second point made as above specified, was that no greater burden could be laid on the railway company with respect to paving than that provided by the franchise ordinance of the city. Integral with this contention, which the court entirely fails to consider, was the fact that the imposition of a greater burden on the railway company in connection with the paving than the burden provided by section 4 of franchise ordinance 281 of the railway company would impair the obligations of the contract of the plaintiff with the city of Oklahoma City.

From the opinion filed in this case, it would appear that the only question as to the violation of Federal and State constitutions related to the contention that the granting of the mandamus denied the railway company of the right to be heard. Such is not the case. The utmost stress, both in the court below and in the briefs and argument in this case, was laid upon the contention that the attempt to impose the burden of the special assessment complained of impaired the obligation of plaintiff's franchise contract, and, as well, impaired the obligation of the contract made and imposed by the terms
394p of the dedication. Neither of these questions is discussed or passed on in the opinion filed herein. It is submitted that the omission to rule on these questions, so seriously urged, is within the purview of the rules of this court relating to re-hearings, and that the court on these questions will afford the plaintiff an opportunity to again present the considerations which counsel believe determinative of the merits of the controversy, regardless of any other questions involved.

The argument on the first proposition as to the impairment of the obligation of the franchise contract is found page 223, et seq. of the original brief herein. The court omits all consideration of this question and fails to consider the ruling decision of this court in Enid City Railway Company vs. City of Enid, 43 Okla. 788. This contention is not to be passed by with the observation that the Enid case related to street surface paving, while the instant case relates to private rights of way assessment as for benefits. The point in the Enid case and the point here is, that since the subject of paving is dealt with in the franchise contract, and the burden of the railway company with respect to paving is therein outlined, such is tantamount to a declaration in the contract that in no
394q other respect or particular can any paving burden be laid upon the railway company. The Supreme Court of the United States has spoken in no uncertain terms on this subject, and the cases on that question are cited in the opinion in the Enid case.

Nor can a holding that the railway company owns a fee in this private right of way lying within the street, alter the considerations governing the decision in the Enid case. A stipulation as to the extent of the burden of the railway company regarding paving, is not dependent upon either the quality or the duration of the right

or authority under which it lays its tracks. Its duty under Section 4 of the franchise ordinance is fixed. This, in effect, contractually declares that under no circumstances shall it be under any duty to do anything on the subject of paving except to pave between its tracks and six inches on each side thereof.

If in the case of M., K. & T. R. R. Co. v. The City of Tulsa, the railway company had had a contract with the City of Tulsa that it should not be liable for any paving burden except in those cases in which the space between its tracks was ordered paved by the city, no one would contend that it, under the physical conditions
394r existing in that case, would have been assessable. Or, if in the much cited and quoted from case of L. & N. R. Co. v. Barber Asphalt Company, 197 U. S., 430, there had been a contract between the railway company and the City of Louisville to the effect that with respect to paving the railway company should do certain things and no others, and the statutes of Kentucky has been assailed on the ground that, as applied to railway company, it impaired the obligations of this contract in violation of the constitution of Kentucky and the constitution of the United States, no one would claim for an instant that the Supreme Court of the United States would have given serious consideration to a contention that the physical relationship of the property to the improvement or to the street, or that the quality of the estate of the railway company in the land sought to be subjected, would have any bearing or weight in determining whether or not this contract was impaired? The supposed cases are on exact all-fours with the contention made here. But the opinion in this case does not touch upon or attempt to discuss, much less decide, this question.

394s Fourth.

What has just been said with reference to the fifth argument presented in counsel's brief and overlooked by the court, applied perfectly to the sixth proposition urged by the railway company, both in the court below and in this court, and in its brief and in oral argument. It was contended that the dedications were made pursuant to statutory authority; that the statute gave to the dedication the exact effect which, by their terms these dedications provided; that at the time the dedications were made the land in question was not within the city limits; that these dedications were filed of record in the register of deeds' office of Oklahoma County, and were notice to the world of the rights of the parties; that with such notice, the City of Oklahoma City embraced this territory within its corporate limits, accepted the benefits of the dedications, though unwilling to be bound by the limitations and burdens therein imposed; that the very paving ordinance and the deeds made thereunder were predicated upon these dedications and upon the descriptions contained in the plats; and that the street ordered to be paved was one entire and continuous street; that the dedications

limited the burden of the railway company by contract, to
394*t* paving across the tracks at street intersections, and to the laying of a curb on each side of the right of way to meet the paving when laid.

It was urged from page 232 to page 270 of plaintiff's original brief, that these dedications constituted contracts which would be impaired in violation of both State and Federal Constitutions, by the imposition of any or other greater burden as to paving than the plats and dedications themselves provided for and required. Numerous cases were cited to the effect that these dedications were contracts within the protection of the Federal and State Constitutions and granted vested rights protected by said constitutions. No authorities to the contrary have been cited. But this court in the opinion which it has filed herein entirely omits any consideration whatsoever of this claim to the protection of the rights guaranteed to the railway company by the Constitution of the State of Oklahoma and the Constitution of the United States. The question should at least, it is very respectfully submitted, have been passed upon in order that the position of this court on the question might be properly considered by the Supreme Court of the United States on review. The decree of the court amounts to a denial of this claim to the
394*u* protection of the Constitution of the United States. But if this court is to deny this claim of constitutional protection, it is submitted that it would be fair to all parties that the views of the court should be expressed in the opinion.

At the bottom of page five of the manuscript opinion of the court, it is said that the "section of the statutes as well as the ordinance and deed of dedication, and the authorities cited by counsel in support of this proposition, have reference to street paving along the surface of which the tracks of the railway company are laid and the space actually occupied as a right of way over which the railway company has an easement only. They have no application to a private right of way 40 feet in width in which the railway company owns the fee and along the center of which the tracks are laid." This sentence is difficult. If it can, according to the natural inference which one would draw from a reading of it, be construed to read that deeds of dedication have reference only to street paving along the surface of streets on which the tracks of the railway company are laid, then surely counsel have been remiss in presenting their case to the court; because the dedications relied upon
394*v* as contracts relieving the railway company from doing any greater paving than across street intersections, and the curbing of rights of way, dealt with, and were made solely in contemplation of these identical private rights of way, and by no means and under no circumstances refer even remotely to street surface paving. One of the deeds of dedication is copied in our original brief, page 6. The references are to "said strips of land," and the burden as to paving relates to "curbing the rights of way" and "paving street crossings over the same." No provision is made in any dedication for any other kind of street railway than one on private rights of way. Hence, to say that these deeds of dedication relate to street

surface paving is to entirely misapprehend the explicit provisions of the dedication.

When it is thus demonstrated by the record that the sole ground assigned by the court for the rejection of its erroneous conception of our contention in this respect, is one which is based upon misapprehension of the facts of the record, as is done in the preceding paragraph, counsel lead themselves to hope that the court, when it does correctly interpret the record, will follow the theory ad-
394*w* vanced on behalf of the railway company, that the dedication contracts are impaired by this attempted assessment, that the city was not required to accept the terms of these dedications; and that under its general authority to law open and lay out highways, if it were dissatisfied with the dedication and limitations therein imposed, it could have condemned the interests of the property owners and of the railway company under these dedications, and thus open the streets free from any limitations upon the burden of the railway company. But this was not done. The dedications were accepted cum onore as all the cases hold, with all the rights of the railway company intact. The contracts for the benefit of the railway company contained in the dedication upon the strength of which alone, as the record discloses, it made large expenditures necessary to enter this farming area, operating its road meantime always at a loss, persisting to this day, is now in full force and clearly protected against impairment under the Federal Constitution.

If the contracts of dedication had no reference to private rights of way or to a forty foot strip owned in fee by the railway company, then the limitations of this dedication contract would not, of
394*x* course, excuse or relieve the railway company from a proper assessment. To put it another way and as the court put it in its opinion filed, if the dedication contracts had reference solely to street surface paving and was neither an express nor implied limitation upon the liability of the railway company respecting private rights of way assessments, then the instant assessment being without the contemplation of the dedication contract, would probably not impair the dedication contract. But the very contrary to this hypothesis, in fact, exists here. The dedications relate only to private rights of way assessments and in no wise relate to street surface assessment. This case involves a private right of way assessment. Therefore the subject matter of this assessment is squarely and entirely within the terms of the dedication contracts. The city admittedly cannot legally impair this dedication contract. This assessment does attempt to impair the dedication contracts, and it is therefore void. To hold it valid, as the judgment of this court affirming the mandamus in the lower court does, and to effectuate such holding, impairs the dedication contract in contravention of Section 10 of Article 1 of the Constitution of the United States, pro-
394*y* viding that no state shall pass any law impairing the obligations of contracts.

The contentions in this respect are fully stated in the original brief herein, commencing at page 232, which counsel cannot but conclude, either was misapprehended or overlooked by the court. And,

in the premises, counsel ask the court on a rehearing, to consider such argument in the light of the attempt which is above made to clarify the application of the same to the actual facts existing in the case.

Fifth.

In discussing the second and third contentions of the railway company that its right of way being a part of the street, cannot abut upon the street and therefore cannot be assessed as abutting property, it is again respectfully represented to the court that the opinion filed overlooks and misapprehends the contentions made and authorities cited. This position of the court, if counsel are correct in their construction of its opinion, is that because of the fact, as it holds, that the railway company owns the fee to this strip, and because it is separated from the paving itself by a curb, that it is assess-
394z able, as other private property is assessible, as for benefits, under the general provisions of the statutes.

It is urged second above herein, this exact physical situation being dealt with by the statute that the burden of the statute is exclusive and that the property cannot be assessed as for benefits in this proceeding in invitum.

The court says on page 7 of the filed opinion,

"By the terms 'fronting and abutting' as used in the statute is meant that between which and the improvement there is no intervening land." 25 Am. & Eng. Cyc. of Law, 2nd Ed. 1190.

Referring to the page of Am. & Eng. Enc. of Law referred to in this quotation, it is found that the definition is that given on page 1190 of "abutting" property. The statute uses the words "fronting and abutting"; so also the quoted statement from the opinion. But the court applies the definition given in the Enc. to the word "abutting," to both the words "fronting and abutting." Our statute requires a dual physical position to be occupied by the property subject to assessment for improvements; it must both "front" and "abut."

The court in its opinion attempts to distinguish between
394aa those cases cited by the railway company in its brief, which dealt with what may be called street surface paving. For example, in the City v. Gas & Elec. Co., 94 Pac., which is cited by the court, the distinction is made that the railway company merely occupied the street under its franchise and that it did not own the fee in the street, the fee being in the abutting property owners to whom the property would revert in event of the cessation of the use of the street. Certain of the cases cited it is true, were to that effect and dealt with that kind of physical condition. These cases were cases of the ordinary street surface, electric or horse street railways and the principles embodied in these cases were attempted to be made applicable to the position here existing because of the fact that the right of way was a part of the street. But cases of this character were not the only cases which were cited on this proposi-

tion. Numerous cases of steam railways having private rights of way in the street, were cited, and it was held that such railways and such rights of way, lying wholly within the street, could not in the nature of things, front upon the street. For instance, this was held in the case of Lightner v. City of Peoria, 37 N. E., 59.

394*bb* (See discussion page 172, et seq. of our original brief).

See also extended quotation from Indiana, etc. R. Co. v. Capitol Paving Co., (Ind.), 52 N. E., 1076, page 181, original brief.

The Kentucky case of Figg v. L. & N. Ry. Co., referred to by the court in the opinion filed, is discussed, page 186, of the brief, as is also the celebrated case of L. & N. R. Co. v. Barber Asphalt Company, at page 195. All of these cases are readily distinguishable from the case at bar, and the principles announced therein are by no means applicable to the case at bar. The distinctions made in the brief at the places above referred to, apparently have been overlooked by the court in the opinion written, and it is respectfully requested, in view of such oversight or omission, that the case be reheard and again examined in connection with the second and third propositions advanced by the railway company in support of its attack upon the validity of this assessment, such discussion appearing from page 155 to 205 of the original brief filed herein.

In making the distinction sought to be made in connection with the argument above referred to, that the railway company

394*cc* in this case owns the fee, the court entirely overlooks the numerous cases cited in the brief to the effect that under a deed purporting to convey a fee, the most that a railway company obtained, was a right of user which would upon the cessation of the use, revert to the grantor as for breach of condition subsequent. In other words, the railway company acquires what is tantamount to an easement; it may be called a fee in an easement and its duration, conditioned upon continued use, will be perpetual. But it is nevertheless a limited estate and not an entire fee as was pointed out in the original brief. While the dedication said that the railway company should have an estate equivalent to one created by general warranty deed, nevertheless the dedication statute itself, Section 511, which the court refers to, page 8, of the manuscript opinion, but manifestely misconstrues, expressly provides that the estate shall be held upon the conditions and for the uses expressed in the dedication and intended by it, and no other, from which it would necessarily result, by reason of the statement also made in the dedication that the property was to be used as a private right of way for the construction, operation and maintenance of a street railway

394*dd* thereupon, that the estate which the railway company acquired under the dedication was not an unlimited fee simple as the court seems to indicate, but was a fee conditioned upon user, and that upon the discontinuance of the use, the property would revert to the grantor.

In fact, on the very day that the opinion was handed down in the instant case, in another opinion in Cause No. 4944, Santa Fe, L. & E. Ry. Co. v. Laune et al, reported in the Okla. Appellate Court

Reporter, Oct. 11, 1917, page 377, this court speaking through Justice Turner, held as stated in the second syllabus, as follows:

"An instrument which is in form a general warranty deed, conveying a strip of land to defendant company for a right of way for its railroad, will not vest an absolute title in the railroad company; but the interest conveyed is limited by the use for which the land is acquired, and when that use is abandoned, the property will revert to the original owners."

The holding in the Santa Fe case is exactly the contention which was made at large in the railway company's original brief herein, and is altogether and entirely inconsistent with the statements made in the opinion filed in the instant case—though these two opinions were filed on the same day.

394*ee* It is submitted that the opinion in the Santa Fe case is the correct one, one in accordance with authorities, and that it is in no wise inconsistent with the opinion in the case of the M. K. & T. Ry. Co. v. City of Tulsa, 45 Okla. 382. In the latter case, the railway company owned lots which abutted and fronted upon the improvement, and which, as lots, had been acquired by the railway company for its use. Furthermore, these lots were in the quarter block abutting and fronting upon the improvement and were squarely within the provisions of the city charter of Tulsa, which is different from the general law under which the assessment in the instant case was sought to be levied. In the Tulsa case the charter of the city had determined what the improvement district should be. The district there is an automatic affair, fixed by plats, as was true in the case of L. & N. R. Co. v. Barber Asphalt Co. But this is not the case under the general statutes of the State; which is a fact that the court overlooked. Under the general statutes, the city commissioners are to determine within certain prescribed limitations, what shall be included, within the improvement
394*ff* district and the property to be included in the exercise of this discretion, must bear certain specific relationship to the improvement. Under the charter of the City of Tulsa, no discretion as to what property shall be included is left with the city commissioners. The charter settles this, as the Kentucky law settled it; and having legislatively determined the question, all property included within the area was assessable.

The statement made by Justice Turner in the Tulsa case, that he was of the opinion that,

"when the charter expressly created a right in the city to assess the entire cost of the public improvement on plaintiff's entire property, including its right of way, where its railway is in or crosses a street, and says nothing about making plaintiff pay any part of this cost where its property abuts on a street to be improved, as here, the intent of the framers of the charter was to exclude any such idea, together with the idea that this cost, or any part thereof, could be

assessed upon any part of the right of way and the same sold in satisfaction thereof,"

was a correct exposition of the law, and this was in part the contention made under the second subdivision treated in this petition for re-hearing.

The charter of Tulsa again differs from the general paving statute, in that the former did not prescribe what the railway
394*gg* company should do when its property was adjacent to the street, whereas the latter does and certainly in the Tulsa case, if the assessment had been under the general law, instead of under the charter of Tulsa, the decision would have been to the contrary, because the dealing with the exact situation would exclude the idea of any assessment except under the theory which the statute expressly applies to that situation.

The charter of Tulsa again differs from the general law, in that by it the quantity or quality of the "ownership" of the property was made the test of assessability, coupled with physical relationship; while under the general law, ownership cuts no figure, the only decisive factor being the physical relationship of the land to the street. And it is submitted that the court, when it overlooked the fact that this railway company is, by the constitution, made a public highway, and that ordinary streets in a city are public highways, and that the entire of the area occupied by the double driveways on Linwood Blvd., and the private right of way lying between the same, are all devoted to the public use as highways, and the fact that by the plat the very name of the street itself is written upon
394*hh* the space devoted to the railway for highway purposes, that the railway was a part of the street and therefore could not abut and front upon it.

Within the definition quoted by the court, this right of way "abuts" upon the improvement, but not upon the street. The test under the general law, is abutment upon the street and not abutment upon the improvement. The assessment is not for the paving of Linwood Blvd., East side, or Linwood Blvd., West side, but for the paving of Linwood Blvd.—an entirety. In other words, the city authorities adopted the plain intendment of the dedication and plat, and treated all as Linwood Blvd. It is a contradiction in terms, it is submitted, and the court must have overlooked these material facts to hold that this private right of way could front or abut upon the street. If ever anything was a part of another thing, the railway right of way is a part of the street, and that which is a part cannot front and abut upon the thing of which it is a part.

The court in its opinion at the bottom of page 8, says:

"If the street should be vacated by the city authorities, this private right of way would not revert to the abutting owners, but
394*ii* would continue to be the property of the railway company. The company took the fee from the original grantors by the dedication before the abutting owners acquired their titles."

Of course the city could not vacate the private right of way, and equally, of course, without the consent of the railway company and abutting property owners, it could not vacate the street; because, by the dedication rights vested in both places in the railway company and in the abutting property owners beyond the power or authority of the city or state. But the court misconceives, it is submitted, the true test of the character of the estate of the railway company, when it says that vacation of the street would not vacate the private right of way or cause its reverter to abutting owners. The thing that tests the estate of the railway company is not what would happen if the city did a certain thing, but what would happen if the railway company did a certain thing; that certain thing being a discontinuance of the use. If when the railway company discontinued the use, its right of way would revert to the abutting property owners, then the estate which it has is a conditional easement. This property is not useable for anything else than a private
394*jj* right of way, within the meaning of the Santa Fe case and under the dedication statute, and is devoted only to that use.

The issue is not involved in this case as to what would happen to this private right of way if the city should attempt to vacate the street. But it is pertinent, in testing the character of the estate which the railway company has, and therefore the applicability of a great number of cases cited in its brief, to consider what would happen if the railway company abandoned the use. The abandonment of the use by the railway company under the decision in the Santa Fe case and the universal rule of cases on this point cited in the brief, is that the estate of the railway company in the property would cease. The fact that it would cease, determines the quality of the estate, and make applicable to this case the large number of decisions cited in the brief to this point under which this assessment becomes invalid. There are considerations which the court has overlooked.

There are numerous other points which might be made by way of distinction and by way of calling the attention of the court to the omission to consider or give weight to sundry
394*kk* authorities cited in the brief of the railway company, particularly with reference to the res judicata character of the judgment in the Federal Court in the suit between the same substantial parties in interest. But, without unduly extending this petition for rehearing, it is respectfully requested that the court grant a rehearing, and permit an oral argument upon the petition for rehearing, upon which the omissions above specifically enumerated and those referred to but not in detail considered herein, may be presented to the court for its re-consideration.

J. B. DUDLEY AND
KENT SHARTEL,
ASP, SNYDER, OWEN & LYBRAND,
Attorneys for Appellant.

395 In the Supreme Court of the State of Oklahoma.

No. 6777.

No. 6778.

OKLAHOMA RAILWAY COMPANY, Plaintiff in Error,

v.

SEVERNS PAVING COMPANY and THE CITY OF OKLAHOMA CITY, Defendants in Error.

Reply to Petition for Rehearing.

1.

It is urged that the court "misconceived the mandamus appealed from". This because the court says that on the reassessment the Railway Company will have an opportunity to be heard as to the amount of the assessment.

It is true as contended in the petition for re-hearing that under the order of the district court the Railway Company on the re-assessment does not have an opportunity to be heard relative to the amount of the assessment. If the Railway Company had sought such an opportunity, it might have been granted. The Railway Company however did not seek such an opportunity. We respectfully submit that having failed to seek such an opportunity, having failed to make that an issue in the trial court, that it cannot be heard in this court to complain that it was not afforded an opportunity which it did not seek.

On this point we respectfully submit that the statement in the opinion of the court that this opportunity will be given ought to be modified, and on this point we refer to the authorities cited in our brief at pages 4 and 5. In addition to what we said there we wish to again repeat by way of emphasis our statement that the Railway Company has not sought a hearing on the amount of the assessment. Its pleadings are fully abstracted in its printed brief extending from pages 15 to 35, and in its supplemental pleading extending between pages 39 and 43. The questions raised by its pleading are (*a*) that it has no property in the district susceptible of benefits, or subject to assessment; (*b*) that its franchise specifies the extent of its liability, and does not include this; (*c*) that the act of 1907-8 relative

396 to paving applies and does not impose this liability; (*d*) That the plat under which this property was dedicated measures the extent of its liability. There is no objection to the amount, nor is their claim that it is entitled to any further hearing. The whole pleading is predicated on the non-existence of any liability whatever. The issue brought in by the amendment arose out of the plea of res adjudicata on account of another decision, and still no claim is made affecting the amount of the assessment.

The question, therefor-, of being heard is an after-thought, and really is not involved in the case.

The failure of the Railway Company to appear at the proper time precludes it from appearing at any later time. The time to review an appraisement is when the council gives the notice and has the appraisement before it for review, and that is the only time.

Weaver v. Chickasha, 36 Oklahoma 226.

Norris v. Lawton, 148 Pac. 133.

2.

The other objections to the opinion raised by the petition for re-hearing, it seems to us, are merely captious and critical, and arise rather out of garbled quotations of the opinion, than out of the opinion of the court.

The statement of their contentions contained in the opinion of the court is a complete and adequate statement. It is as follows:

"Counsel urge in support of the contention that the strip of land in question is not subject to assessment for street improvement: (1) The limit of the burden which the statute permits to be imposed upon the railway company with respect to paving is to require it to pave between the tracks and a narrow space on either side of same, as provided by Sec. 722, Rev. L. 1909, the franchise ordinance of the city, and the dedication of such private right-of-way; (2) the right-of-way of the railway company in the street does not come within the expression, 'lots, pieces, or parcels of land fronting and abutting upon the improvement', within the meaning of the statute; (3) the right-of-way of the railway company is a part of the street and cannot 'abut' upon the street; (4) if the statute imposes a lien upon a portion of the road-bed and right-of-way of the railway company, it is void as against public policy which forbids the
397 breaking up of a system and the crippling of public service corporations; (5) The private right-of-way in question is not susceptable to benefits within the meaning of the Constitution and Statutes of the State, and under the evidence offered is not benefitted by the improvement; (6) the decision of the United States District Court in the case of Oklahoma Railway Co. vs. City of Oklahoma City is res adjudicata."

The court after this full and complete statement of their position then proceeds to determine these contentions adversely to them, and there is nothing we can add to the able discussion of the opinion. In fact the petition for re-hearing, it seems to us, is a mere reiteration of the original brief, and the statement repeated frequently in the petition that the points have been overlooked is not borne out by an examination of the opinion.

We do not believe we can add anything to the opinion on the main issues presented, but are filing this reply on account of the first question raised, and in order to call the attention of the court to the fact that that issue is not properly in the case.

Respectfully Submitted,

AMES, CHAMBERS, LOWE & RICHARDSON,

Attorneys for Severns Paving Company.

[Endorsed:] Filed in Supreme Court of Oklahoma, Nov. 17, 1917. William M. Franklin, Clerk.

398 Be it known that thereafter, to-wit, on January 22nd, 1918, the Supreme Court of the State of Oklahoma made a Journal Entry order herein denying the petition for rehearing, which said order is in words and figures as follows, to-wit:

399 Supreme Court, December Term, 1917, January 22nd, 1918, Tenth Judicial Day.

No. 6778.

OKLAHOMA RAILWAY CO.

vs.

SEVERNS PAVING CO. et al.

And now on this day it is ordered by the court that the petition for rehearing in the above cause, be, and the same is hereby overruled.

400 *Certificate.*

I, William M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing *one (1)* pages, numbered from one to 399, inclusive, is a true and complete transcript of the record and all proceedings in said Supreme Court in the case of Oklahoma Ry. Co. Plaintiff in Error, vs. Severns Paving Co. et al., Defendants in Error, as the same remains of record and on file in this office.

In Witness Whereof, I hereunto set my hand and attach the seal of said Court at the City of Oklahoma City, this 4th day of April, A. D., 1918.

[Seal Supreme Court, State of Oklahoma.]

WILLIAM M. FRANKLIN.
Clerk.

By NEAL ORR,
Assistant.

401 In the Supreme Court of the United States.

OKLAHOMA RAILWAY COMPANY, a Corporation, Plaintiff in Error,

vs.

SEVERNS PAVING COMPANY, a Corporation, and City of OKLAHOMA CITY, a Municipal Corporation, Defendants in Error.

To the Clerk of the Supreme Court of the United States:

The Plaintiff in Error, Oklahoma Railway Company, states that the points upon which it intends to rely in this case in the Supreme Court of the United States, are:

1. That the law and authority of the State of Oklahoma, under which the paving proceedings appearing in the case were had and such paving proceedings, insofar as the same effect the Plaintiff in Error or its property, impair the obligations of the franchise contract of the Plaintiff in Error with the City of Oklahoma City, in violation of Section 10, Article 1 of the Constitution of the United States;

2. That the law and authority of the State of Oklahoma, under which the paving proceedings appearing in the case were had, and such paving proceedings, insofar as the same effect the Plaintiff in error or its property, impair the obligations of the contract of the Oklahoma Railway Company manifested by the private right-of-way dedications shown in the case, in violation of Section 10, Article 1 of the Constitution of the United States; and,

3. That the law and authority of the State of Oklahoma under which the paving proceedings appearing in the case were had, and such paving proceedings, insofar as the same effect the Plaintiff in Error or its property, deprive the plaintiff of its property without due process of law in violation of the Fourteenth Amendment
402 to the Constitution of the United States;

as each of such points are more fully and variously set out in the Assignments of Error appearing in the Record.

And the Oklahoma Railway Company, Plaintiff in Error advises you that it thinks necessary for the consideration of such points the following parts and portions of the Record filed in this case, in obedience to the commands of the Writ of Error herein, viz:

Pages 2; 4 to 11 inclusive; 12 to 17 inclusive; 19; 20; 21 to 23 inclusive; 24 to 27 inclusive; 97 to 113 inclusive; 114 to 117 inclusive; 118 to 162 inclusive; 221 to 255 inclusive; 256 to 366 inclusive; 368; 369; 371; 372; and 378 to 400 inclusive.

HENRY E. ASP AND
HENRY G. SNYDER,
ASP, SNYDER, OWEN & LYBRAND,
Attorneys for Oklahoma Railway Company, Plaintiff in Error.

The Severns Paving Company and the City of Oklahoma City, Defendants in Error above named, acknowledge service of the within and foregoing upon them this 2 day of May 1918, and waive the designation in writing of any additional parts of the Record by them deemed material to the consideration of the points involved in the foregoing entitled cause, and consent to a hearing on the parts designated by the Plaintiff in Error.

AMES, CHAMBERS,
LOWE & RICHARDSON,
Attorneys for Severns Paving Co.
B. D. SHEAR,
Attorney for City of Oklahoma City.

403 [Endorsed:] In the Supreme Court of the United States. Oklahoma Railway Company, a Corporation, Ptf. in Error, vs. Severns Paving Company, a Corporation, and City of Oklahoma City, a Municipal Corporation, Dfts. in Error.

404 [Endorsed:] File No. 26,491. Supreme Court U. S. October Term, 1917. Term No. 1024. Oklahoma Railway Company, P. E., vs. Severns Paving Company et al. Statement of points to be relied upon, and designation by plaintiff in error of parts of record to be printed and consent thereto. Filed May 7th, 1918.

Endorsed on cover: File No. 26,491. Oklahoma Supreme Court. Term No. 440. Oklahoma Railway Company, Plaintiff in Error, vs. Severns Paving Company and The City of Oklahoma City. Filed May 7th, 1918. File No. 26,491.

FILED
OCT 9 1919
JAMES D. MAHER,
Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

NO. 186

OKLAHOMA RAILWAY COMPANY,
Plaintiff in Error,

vs.

SEVERNS PAVING COMPANY AND THE CITY OF OKLAHOMA CITY,
Defendants in Error.

STATEMENT OF CASE, SPECIFICATION OF ERRORS, AND BRIEF OF THE ARGUMENT OF OKLAHOMA RAILWAY COMPANY, PLAINTIFF IN ERROR

HENRY E. ASP,
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SHARTEL, DUDLEY & SHARTEL,
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Oklahoma Law Brief Company, 1018 West First Street, Oklahoma City

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NO. 106

In the Supreme Court of the United States

OCTOBER TERM, 1919

OKLAHOMA RAILWAY COMPANY,
Plaintiff in Error,

vs.

SEVERNS PAVING COMPANY AND THE CITY OF OKLAHOMA CITY,
Defendants in Error.

STATEMENT OF CASE, SPECIFICATION OF ERRORS, AND BRIEF OF THE ARGUMENT OF OKLAHOMA RAILWAY COMPANY, PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a proceeding in error to the Supreme Court of the State of Oklahoma, to review the judgment of that Court under its opinion, not yet officially reported, but found in 170 Pacific 216, and at

stroyed, taken up or removed, to its previous condition. And wherever the said city of Oklahoma City shall hereafter pave or repave any street upon which said line of street railway is constructed, it shall be the duty of said railway company to construct or pay the cost of construction of a total width in area along the street so occupied, of six and two-thirds (6 2-3) feet for each track occupying such street according to specification adopted by said council. And to maintain such pavement in good condition during the time such tracks may remain in such streets, except when the duty of the maintenance of said pavement may rest upon any contractor constructing such pavement.

"Provided, that the said railway company may construct along its tracks detachable curbs of blocks or brick of sufficient width to enable the said company to take up or repair its tracks or rails without disturbing any pavement of a cement or asphaltic character used on any such street.

"Upon the final determination of the city council to pave any such street, it shall cause the City Clerk to give a written notice of such determination to said railway company, and the railway company shall, if it desires to construct said pavement itself, so notify the City Clerk in writing before the contract for the construction of such pavement is awarded; and it shall thereupon be the duty of said railway company, upon making such election, to execute its part of such paving in conjunction with the progress of the same work under the direction of the city. In the event of said rail-

way company failing to give such notice, or failing to proceed with the work, if such notice is given, the said work may be executed by the city and charged to the said railway company by an assessment benefits as provided by the law for the assessments of benefits 'to individual abutters' and the measure of the liability of said railway company shall be the cost of construction by contract of that portion of the pavement hereby made the duty of the said railway company to construct. And the said assessments shall be levied and collected in the same manner as the assessments of individuals and all of the property of the said railway company shall be liable therefor. The said railway company hereby by the the acceptance of this ordinance assents to the collection of such assessments in the manner herein provided for." (Tr. p. 32.)

Section 5 of the franchise ordinance required the grantee to make a deposit as a guaranty that it would proceed with construction within 90 days, and have at least four miles of line in operation within nine months thereafter.

Section 6 reserved to the city the right to make any and all needful police regulations with reference to the operation or maintenance of street car system, and to pass ordinances regulating the use of head-light, gongs, fenders, etc.; and restricted the rate of speed of the cars.

Section 7 of the franchise ordinance fixed the rate of fare; provided for the issuance of transfers; required the carriage of school children in actual attendance upon the public schools of the city at the rate of 2½ cents, and the carriage of mail carriers, policemen and members of the fire department free of charge.

Section 8 permitted the railway company to borrow money an issue bonds secured by mortgage upon the railroad property.

Section 9 reserved to the city the power to purchase the plant of the railyway company, after thiry years.

Section 12 provided for the participation of the city in the profits of the railway company, after ten years, under stipulated conditions.

Section 13 reserved the right to grant similar rights to other railway companies to use streets not occupied by the grantee in the ordinance.

This ordinance was formally accepted by the Metropolitan Railway Company, which conformed to the requirements thereof, and expended more than $400,000.00 in construction and equipment.

At the time of the enactment of such franchise

ordinance the City had, under the statute of the then Territory of Oklahoma, no express authority to make such grants. The Territorial Legislature on March 16, 1903 (Art. 4, Chap. 9, Ses. L. Okla., 1903, p. 141), enacted the following law:

> "Section 1. Corporations may be formed under the general railway laws of the Territory of Oklahoma who shall have the power to use electricity for the propulsion of their cars and rolling stock, provided that no surface conductor, third rail or other similar device for the transmission of such power other than for return circuit shall be used.
>
> "Section 2. Such corporations, in addition to the powers exercised by railroad corporations generally, may, with the consent of the authorities of any city or town in the Territory of Oklahoma located upon or along its lines, construct system of street railways upon such streets and upon such terms and conditions as may be agreed upon between such corporations and such city or town, and may also accept lighting contracts with such cities or towns, to supply the said cities or towns or the inhabitants thereof, with light or electric current for power or such railways or such corporations may also acquire by purchase or consolidation, plants, franchises, contracts, good will and other property of any existing street railway or lighting company.
>
> "Section 3. All licenses or franchises heretofore granted to any street railway company

authorizing the construction and operation of an electric street railroad in any city of the first class in the Territory of Oklahoma, and which have not become forfeited or lapsed by their terms, are hereby ratified, legalized and confirmed."

The foregoing quoted Statute appears as sections 1482, 1483 and 1484, Rev. L. of Okla., 1910.

Plaintiff in error was organized as a corporation of the Territory of Oklahoma on June 14, 1904. On June 15, 1904, the Metropolitan Railway Company, by deed, conveyed to the Oklahoma Railway Company all of its property, good will an all of its franchises and rights of whatsoever nature under franchise ordinance No. 281 aforesaid (Tr. p. 44). On June 27, 1904, the mayor and council of the City passed an ordinance, No. 427, in which the transfer, conveyance and assignments of the property rights and franchises of the Metropolitan Railway Company to the Oklahoma Railway Company were ratified, confirmed and approved, and in which the City assented to such transfer (Tr. p. 45).

After the Railway Company became vested with all rights under such franchise ordinance, it proceeded thereunder to extend its lines and sys-

tem of street railways in the City, and, in reliance upon the rights contracted thereby, had, at the time of filing pleadings, in addition to the amount theretofore expended by the Metropolitan Railway Company, expended the sum of approximately $4,000,000.00 (Tr. p. 44).

Prior to November 29, 1909, and at that time, the Linwood Place Development Company was the owner of certain undeveloped, unsettled, uninhabited land, situated in the territory either adjacent to or some distance removed from the corporate limits of the City, which it desired to plat and sell as residence property. In order to procure street car service for and through such territory and fit it for residence uses and purposes, such Development Company entered into an agreement with the Oklahoma City and Suburban Railway, its successors and assigns, for the extension of what is now known as the Linwood line of street railway, into and through such territory. The Oklahoma City and Suburban Railway was a subsidiary of the Oklahoma Railway Company, the officers of which directed and controlled all of its affairs, that company being a construction company for the Oklahoma Railway Company, and the latter having suc-

ceeded to all rights of the former respecting the subject matter here involved (Tr. p. 66). The agreement referred to provided that the said Development Company would, to induce the Railway Company to extend its lines through such tract, dedicate to the Oklahoma City and Suburban Railway, its successors and assigns, a certain private right-of-way, located within what was then to be known as Shartel Boulevard, but which is now known as Linwood Boulevard, and situated between the double driveway of such boulevard, with the provision to be inserted in such dedication that the sole duty and liability of the Railway Company with respect to paving or improving such boulevard, in the event the same should ever be paved or improved, should be to place a curb on each side of such private right-of-way to meet the paving and to pave across its tracks at street crossings (Tr. p. 48). Such agreement was subsequently executed by the making and filing of a plat and dedication, which appears in the Transcript at pages 53 to 56. This dedication contains the following:

"We hereby dedicate to the public for the ordinary purposes of travel, all the streets, avenues

and boulevards as shown on said attached plat; but this dedication is subject to the following prosions, conditions and reservations, which are made a part hereof, to-wit:

"A strip of land forty (40) feet wide, being twenty (20) feet on each side of the center line of Shartel Boulevard, as platted North and South and East and West through said Addition; also a strip of land Thirty-three (33) feet in width, being Sixteen and one-half (16½) feet on each side of the center line from Shartel Boulevard North on Drexel Boulevard.

"Said strips of land are set aside for the exclusive use of and dedicated to the Oklahoma City and Suburban Railway, its successors and assigns, with a like effect as though deeded and conveyed to said Company in fee simple by separate deed, subject, however, to the following conditions:

"Said Oklahoma City and Suburban Railway shall be subject to all the reasonable police regulations and shall provide crossings over its tracks at all street crossings and when said Boulevards are paved said Company shall curb its private right-of-way and pave street crossings over same." (Tr. p. 53).

The dedication further provided that no city shall ever have the right to grant to any person, firm or corporation the right to use any of the streets within the plat for the erection of poles, but that all poles should be on the rear lot line. Detailed restrictions were made as to the character of residences or other buildings which might be

erected within the Addition, and the right was reserved to "any property owner in this Addition * * * to enforce any of the provisions contained herein or to prevent their violation by the proper action in court." The plat is inserted at page 56 of the Transcript, and shows Shartel Boulevard and the physical relationship of the right of way in question to the double drive-ways and the platted lots and blocks of the Addition.

The foregoing dedication was made in conformance to the provisions of what now appears as Art. VIII, Chap. 10, Rev. L. of Okla. 1910, Secs. 507-525. Section 511 of that Article reads:

> "When the plat or map shall have been made out and certified, acknowledged and recorded as required by this article, every donation or grant to the public, or any individual or individuals, religious society or societies, or to any corporation or body politic, marked or noted as such on said plat or map, shall be deemed in law and equity a sufficient conveyance to vest the fee-simple of all such parcel or parcels of land as are therein expressed, and shall be considered to all intents and purposes a general warranty against such donor or donors, their heirs or representatives, to said donee or donees, grantee or grantees, for his, her or their use *for the uses and purposes therein named, expressed and intended, and no other use and purpose whatever;* and

the land intended to be used for the streets, alleys, ways, commons or *other public uses* in any town or city or addition thereto shall be held in the corporate name thereof in trust to and for the use and purposes set forth and expressed or intended."

In reliance upon and induced thereto by the limitation of its paving burden as expresesd and intended in the dedication aforesaid, the Oklahoma City and Suburban Railway constructed a line of railway through said Addition upon the private right of way granted to it by the owner of this undeveloped territory, and in so doing the Oklahoma City and Suburban Railway, and the Oklahoma Railway Company which succeeded to its rights thereunder, expended large sums of money in constructing such line, and the latter has operated the same at a loss, persisting to the time of the trial (Tr. p. 48).

After the execution and filing of the dedication and plat aforesaid, the City extended its corporate limits to embrace the lands included within the plat, describing such lands as "Linwood Place Addition," and thereafter, by ordinance, the City changed the name of "Shartel Boulevard," as platted in said Addition, to Linwood Boulevard.

After embracing such territory within the City and changing the name of street, the City, on October 11, 1910, adopted a resolution to pave Linwood Boulevard from the center line of Sixteenth street to the east line of Grand Boulevard (Tr. p. 78). In the preliminary estimate, the City Engineer provided for 8050 lineal feet of "curb single," which distance, as a calculation based upon the plat shows, provides for the laying of a curb only at the exterior of each of the two double drive-ways in the street, and does not provide for the curbing of those sides of the paved double drive-ways lying adjacent to the private right-of-way.

The paving proceedings so instituted were, from the time of the preliminary resolution to the making of the assessment, carried on in accordance with the provisions of what now appears as Art. XII, Chap. 10, Rev. L. of Okla., 1910, Secs. 608 to 644; with, however, the exception hereinafter specifically noted, respecting the assessment of the private right-of-way of the Railway Company in Linwood Boulevard, the error in connection with which is the occasion for this litigation, instituted to compel a re-assessment.

A contract for such paving, based upon the preliminary estimate of the City Engineer and entered into pursuant to bids submitted after advertisement therefor, was made between the City and Paving Company, and under this contract Linwood Boulevard was paved; the street being described as "Linwood Boulevard." While no reference was specifically made in the contract to the fact that Linwood Boulevard consisted of double driveways, yet the estimate as to the area of asphalt macadam paving clearly, when compared with the plat, indicates that the space to be paved, and which was actually paved, was in double drive-ways and did not include the right-of-way strip. The contract is found Transcript, pp. 88-93. The paving proceedings are set out in the Transcript, pp. 78-126. One of the provisions in the contract reads:

"It is further agreed that the City shall not in any case become liable for the payment of the cost of paving the spaces occupied by the street car tracks, should such spaces be paved by the contractor." (Tr. p. 92.)

Another provision of the contract was that the City undertook to "cause the levy of assessments against the property liable to the same un-

der the laws of the State of Oklahoma, and will levy and collect annually, in the manner provided by the laws of the State of Oklahoma, a sufficient tax to pay the bonds" to be issued in payment of the contract price of paving.

The Railway Company having refused to pay an assessment attempted to be levied against it in such paving proceedings, on September 22, 1913, the Paving Company, claiming to own the bonds issued in payment of the contract price of the paving, applied to the District Court of Oklahoma County, Oklahoma, for the issuance of an alternative writ of mandamus, which was issued, requiring the City and the members of its Legislative Body *and the Railway Company* "to cause a new and proper assessment to be made upon the property of the Oklahoma Railway Company, a corporation, fronting and abutting upon Linwood Boulevard from the center line of 16th Street to the East line of Grand Boulevard, in Oklahoma City, Oklahoma, said benefits to said property amounting in the aggregate to $12,046.16, and that you do and perform all acts necessary to a proper assessment of said benefits upon the property of said defendant, the Oklahoma Railway Company, fronting and

abutting upon said improvement, or that you show cause on or before twenty days from the date of this writ why you have not complied with this order, and that you bring with you this order (Tr. p. 25). As a predicate for this order the court in the alternative writ, after reciting the several paving proceedings, and the making of the assessing ordinance, found that "the Board of Commissioners of Oklahoma City, Oklahoma, instead of assessing the apportionment to the property owned by the Oklahoma Railway Company against the property of said company fronting and abutting upon said improvement district, wrongfully and unlawfully assess the same against the Oklahoma Railway Company *generally*, in the sum of $12,046.16" (Tr. p. 23). And further found "that the attempted apportionment and subsequent assessment against the Oklahoma Railway Company generally for the cost of said improvement is ***null and void;*** that no taxes have ever been collected on account of the cost and benefits accruing to said property; that the plaintiff is hindered and prevented from the collection of said assessment bonds, and that a new appraisement and apportionment should be made, and that the cost of said improvement apportioned to the Oklahoma Railway Company assessed

against the property of the said Oklahoma Railway Company fronting and abutting upon said street improvement" (Tr. p. 25).

The City in its return to this alternative writ admitted the making of the contract with the Paving Company and the enactment of the assessing ordinance, and while neither affirming nor denying that "the manner of assessing the said Oklahoma Railway Company, as in said alternative writ of mandamus alleged was or is illegal and void," yet offered to do what the Court should order in the premises, specifically praying that the Court adjudge either that the assessment against the Railway Company as made is legal, or, if void, that the Railway Company is required to pay its just proportion of the cost of the improvement, and that the Court direct the manner in which the assessment shall be made against the Railway Company (Tr. p. 27).

The Railway Company in its return to the alternative writ called the attention of the Court to the fact that the alternative writ commanded nothing to be done by it, but protested against the Court requiring a new or any assessment to be made upon the right-of-way of the Railway Company in

Linwood Boulevard, and protested against the assumption of the Court in the alternative writ that the benefits to its property resulting from such paving amounts to $12,046.16, or any sum whatever, denying that it had any property in the vicinity of the improvement benefited or susceptible of benefits, or which under the Statute under which the assessment was attempted to be made, is subject to assessment for benefits.

The Railway Company's return then set up the fact that it owns the franchise right under ordinance No. 281 of the City; claimed that such franchise constituted a contract protected from impairment by the provisions of Sec. 10, Art. 1 of the Federal Constitution, and that the limit and extent of its burden respecting paving and the only duty which could be imposed upon it with reference to the subject of paving was that prescribed in the ordinance, and particularly in Sec. 4 thereof, above quoted. It showed that no resolution had ever been adopted by the City, nor had the City Council caused the City Clerk to give to it (the Railway Company) notice that it was required to pave the space between its tracks, as provided by Sec. 4 of the franchise; it, therefore, prayed the

protection of the Federal Constitution in behalf of its contract aforesaid.

The Railway Company by its return further set up the facts hereinbefore stated respecting the extension of its line into this rural district and the limitation of its paving burden under the agreement for such extension, and contained in the plat and dedication referred to, and alleged that it had fully performed its obligations as defined by the plat and dedication, by curbing its private right-of-way to meet the paving and by paving across its tracks at street intersections. It alleged that when the land embraced within the City limits of the City, the streets, avenues, boulevards and alleys shown upon the plat were by that act accepted by the City as highways of the City, subject to the terms, conditions, limitations and restrictions therein expressed and intended; and that by accepting such highways *cum onore,* the City had thereby agreed to each and every of such limitations and conditions, and that the plat and dedication had thereupon become a contract between the City and the owner and dedicator of the tract of land, and the Railway Company, within the protection of Sec. 10, Art. I, of the Federal Constitution, the benefits

of which protection the Railway Company prayed as against any attempt made by the Legislative Body of the City, either voluntarily or pursuant to the mandatory requirement of the Court, to impose upon it any other, different or greater burden respecting the paving than that prescribed in the dedication an plat. It was further pointed out that the dedication had been made pursuant to authorization of law, and that rights of which the Railway Company could not be deprived without due process of law had vested thereunder.

The Railway Company further set up the above quoted proviso clause of Sec. 1 of the franchise ordinance, and alleged that the same had the effect of adding to the franchise contract the terms of the aforesaid dedication, and that the contract thus resulting from a combination of the proviso clause aforesaid, and the provisions of the plat, was likewise impaired—or would be impaired—by the imposition of any burden other or different from that prescribed in the plat; and, in view of its allegation that it had no property in the vicinity of the improvement capable of being benefited by the paving, the Railway Company claimed the protection of the 14th Amendment as against

any attempt to assess its property as for any benefits resulting or accruing from the proposed improvement. The only property the Railway Company had in the vicinity of the improvement was the right-of-way strip lying in the street between the double driveways thereof.

Respecting the subject of benefits, the witness John W. Shartel testified, and his testimony was offered and refused, as follows:

"Q. That private right-of-way is susceptible of what use?

A. I don't think it could be put to any other use, except a railroad—a trolley line.

Q. Is it valuable for any other purpose?

BY JUDGE AMES: Objected to as immaterial.

Q. Or was it, at this time, valuable for any other purpose, or at the time this paving was done?

BY THE COURT: Overruled.

BY JUDGE AMES: Exception.

A. Why, I don't believe it had any value for any other purpose but that. Possibly it might have had some value, or would have had some value, at some time, for the purpose of widening out the street, if the occasion had ever required it. That would be the only value that I could think of that the property could ever have, except

for a railway over it; or possibly it might be used in beautifying the town, if there were no railroad there, as a part of a public park system, by planting it; but it would have no use for commercial purposes whatever.

Q. Are you familiar with real estate values in Oklahoma City in 1910, 1911 and '12, and in that neighborhood?

A. I am.

Q. Are you familiar with the value of that property, as it was platted there, prior to the time the paving was made?

A. I am.

Q. What would you say was the value of that for the use to which it could be put, if any use to which it could be put, immediately prior to the commencement of these proceedings to pave Linwood Boulevard?

By Judge Ames: Objected to as immaterial.

By the Court: It is your contention that you can go into that matter, without bringing in everybody that is interested in the property along the line to show the relative values of the two? Are they to be bound by a hearing where the question of values is gone into—

By Mr. Snyder: If your Honor please, everybody that owns property there is a party to this suit.

By the Court: Have they all been served?

By Mr. Snyder: Yes, sir, I think they have. But that isn't the object of this question.

BY THE COURT: Well, what is it?

BY MR. SNYDER: The object is to show that no benefit accrued to this land from making these improvements.

BY MR. SNYDER: (After argument): We offer to show by this witness, in response to this line of questioning, in answer to these questions and the questions which will be propounded following them, that this land was never, at any time, worth more than $800.00 an acre, for any purpose; that prior to the making of the improvements that it was worth approximately $500.00 an acre; that after the making of the improvements involved here that it was worth $300.00, and that the fact that the paving was placed in there along the two sides of the right-of-way had decreased the value of the property materially for the use to which the street railway could put it, because of modern conditions of travel, involving the use of automobiles, and the ease of private travel by private vehicles in preference to travel over a street railway line.

BY MR. AMES: We object to it as incompetent, irrelevant and immaterial.

BY THE COURT: Sustained.

BY MR. SNYDER: Exception." (Tr. pp. 68-69.)

The Railway Company further contended that under the paving law and that provision which required a re-assessment it was necessary for such re-assessment to be commenced at that point in the

original proceedings at which the error necessitating the re-assessment first occurred, and that, as complained by the Paving Company, such error crept into the paving proceedings at the time of the appointment of appraisers and the designation of the property to which they should apportion the benefits, and that it would therefore be requisite for any re-assessment to be commenced at that point, and that upon the giving of notice of the reviewing of the appraisers' report the Railway Company should have the right to be heard as to the question of benefits resulting to its property from the improvement, and that an order of the Court, definitely fixing the amount which should be assessed against it would deprive it of its right to be heard upon such review; and that in view of the holding of the Court that the proceedings were void, it had never been afforded an opportunity to be heard on the question of benefits, and that therefore an order of the Court requiring the assessment of a definite sum against it as for benefits would unlawfully control the discretion of the City Commissioners in reviewing and making the assessment, and would deprive it of its property without due process of law and without that due process afforded to it by

the Statutes of the State, in violation of its rights under the 14th Amendment.

The Railway Company in its return further urged that its right-of-way being and lying within and as a part of the street, could not be said to "front and abut" upon the street as provided by the paving law, and also contended that because of the fact that the paving statute had fully outlined the duty of steam and street railways, no other burden or duty could be imposed than that there provided. These latter contentions, involving the application and construction of State Statues were by the Supreme Court resolved against the Railway Company.

The State District Court, upon the issues formed by the alternative writ and the returns of the City and of the Railway Company thereto (the alternative writ and return constituting the pleadings under the State practice), on Feb. 28, 1914, entered its findings and judgment, concluding, after matters of inducement, in the following language:

"The court further finds that all of the proceedings, resolution, actions *or* the mayor and city council *of* the mayor and city commissioners up to and including the ordinance levying the assessment

were regular, and in accordance with law; in all respects *exepct* that the property of the said defendant Oklahoma Railway Company was not descrived with sufficient accuracy to sustain the levy of said assessment and that said assessment is invalid and insufficient as an assessment against the property of the Oklahoma Railway Company subject to said assessment and that in respect to the said assessment against the said Oklahoma Railway Company, it is the *duly* of the city mayor and the city commissioners of the city of Oklahoma to reassess the same as provided by law.

"The court further finds that the said defendant the Oklahoma Railway Company, a corporation, is the owner of a private right of way lying between the two driveways of the said Linwood Boulevard in said city which said private right of way extends thr*eo*-gh the center of said Blvd. from the center line of 16 street at its intersection with Linwood Boulevard in said City throughout and along the course of said Linwood Boulevard to the east line of Grand Boulevard, where it intersects with Linwood Boulevard in said city. That said private right of way is occupied by the tracks, poles and appurtenances of the said defendant, Oklahoma Railway Company, and that the general public are excluded from said right of way, except at street intersections, by a curbing installed by the said Oklahoma Railway Company from four to six inches high along the outer boundaries of said private right of way, except at street intersections. That through this portion of said Boulevard said private right of way is *forth* feet in width, and that said private right of way fronts and abuts upon said improvement and is and was subject to assessment for its just proportion of the cost of said improve-

ments which said sum has been fixed by the said board of appraisers and mayor and city commissioners of the said city of Oklahoma City at the sum of $12,046.16, with interest thereon from January 23, 1912, at the rate of seven per cent per annum, payable in installments as aforesaid.

"The court further finds that said private right of way should be re-assessed by the said mayor and the city commissioners of the city of Oklahoma City for the said sum apportioned against it as aforesaid.

"It is therefore ordered, adjudged and decreed by the court that said Wm M. Grant, as mayor, W. H. Hampton, Commissioner of Public Property; J. T. Highley, commissioner of Public Safety; Guy E. Blackwelder, Commissioner of Public Work, and Elmer C. Trueblood, Commissioner of Accounting and Finance, of the city of Oklahoma City, Oklahoma, be and they are hereby commanded to re-assess against the said private right of way of the Oklahoma Railway Company by a proper description the said sum of $12,046.16, together with interest thereon from December 11, 1911, at the rate of seven per cent per annum, payable in installments as provided by the said ordinance numbered 1598, and that they take such steps as may be necessary to properly re-assess said property of the said defendant the Oklahoma Railway Company.

"To all of which findings, conclusions, orders and judgment said defendant the Oklahoma Railway Company excepts" (Tr. pp. 130-131).

After motion for new trial was filed and overruled, the cause was duly appealed to the Supreme

Court of Oklahoma, which affirmed, *without modification*, the judgment of the trial court; Justice Kane dissenting (Tr. p. 142).

The petition for rehearing was filed; the opinion was withdrawn and corrected in minor, unimportant particulars and thereafter refiled; the petition for rehearing was denied. Thereafter in due time a petition for writ of error was presented to the Chief Justice of the State Supreme Court and was on March 29th, 1918, allowed.

Assignments of error was duly made; the writ of error was issued; the bond was approved and the cause lodged in this court.

The assignments of error (Transcript, page 8), state in varying forms the several contentions that were made in the Supreme Court of Oklahoma on these phases involving claims to the protection of the contract clause and Fourteenth Amendment, and the denying of such contentions was duly assigned as error.

For convenience and in order to shorten the presentation of the argument, the several assignments of error will be grouped under and stated as three contentions; assignment from one to

seven, as the assignments appear in the transcript, being treated under the first contention hereinafter stated; assignments from 8 to 11, inclusive, shown by the transcript, being treated as the second contention hereinafter appearing; and assignment No. 12 being treated as stated in the 12th formal assignment of error as shown by the transcript.

SPECIFICATIONS OF ERROR.

FIRST.

In no event can any greater burden with respect to paving be imposed upon the Oklahoma Railway Company than was outlined in the franchise ordinance No. 281 of the city where the entire duty and burden of the railway company with respect to paving is detailed. The imposition of any other or greater burden than that provided for by the franchise is void under the Federal Constitution as impairing the obligation of the franchise contract; and the Supreme Court of Oklahoma erred in not so holding.

SECOND.

In no event can a greater burden be imposed upon the railway company respecting paving, insofar as its private rights of way are effected, than the burden provided in the dedication of such private right of way, such dedications having been made when the land in question was farm property, not within the city limits, the area included within such dedication having been subsequently taken into the city with knowledge of the restrictions contained in the plats and dedications, such restrictions and conditions having been the inducement of the railway company to build in these outlying districts, and constituted contracts which would be impaired in violation of the Federal Constitution by the imposition of any or other greater burden as to paving than the plats and dedications provide for and require; and the Supreme Court of Oklahoma erred in not so holding.

THIRD.

The Supreme Court of the State of Oklahoma

erred in upholding the ruling of the District Court of Oklahoma County refusing to permit the Oklahoma Railway Company to introduce evidence showing that the paving of Linwood Boulevard, conferred no benefit whatever upon the private right-of-way in question and that in view of the physical form, extent and location of such private right-of-way, it was susceptible of no benefit whatsoever consequent upon such paving; and the said Supreme Court of the State of Oklahoma erred in refusing to hold and adjudge that the imposition of any lien upon the said private right-of-way for and on account of such paving and the charging of such private right-of-way with a lien for any portion of the cost of such paving, would deprive the Oklahoma Railway Company of its property without due process of law in violation of that portion of the 14th Amendment to the Constitution of the United States providing that no state shall deprive any person of property without due process of law, the protection of which amendment the Oklahoma Railway duly claimed.

BRIEF OF THE ARGUMENT.

FIRST.

In no event can any greater burden with respect to paving be imposed upon the Oklahoma Railway Company than was outlined in the franchise ordinance No. 281 of the city where the entire duty and burden of the railway company with respect to paving is detailed. The imposition of any other or greater burden than that provided for by the franchise is void under the Federal Constitution as impairing the obligation of the franchise contract; and the Supreme Court of Oklahoma erred in not so holding.

In the first case decided by the Supreme Court of Oklahoma after the erection of the State, viz: *Oklahoma City* v. *Oklahoma Railway Co.*, 20 Okla. 1, 93 Pac. 48, that Court had occasion to pass upon franchise ordinance No. 281 of the City, under which the Railway Company here claims. Section 13, Article 9 of the Constitution of the State forbade the issuance of passes or free transportation by railroad or transportation companies. The Oklahoma Railway Company, in a mandamus proceeding which was brought to compel it to carry free United States mail carriers, city policemen and firemen, as required by Sec. 7 of the ordinance, submitted the case upon the issue as to whether such section of the Constitution would be violated by carrying out the provisons of the

franchise contract. The State Supreme Court said:

> "We are of the opinion that this contract which existed between Oklahoma City, the relator herein, and the Oklahoma Railway Company, the respondent herein, was not only a valid contract prior to the adoption of this Constitution, but is also now a valid contract, not in conflict with Sec. 13, Art. 9 of said Constitution, and that the former is entitled to the relief prayed for. Let the writ of mandamus issue. All the justices concur."

In another case, *Oklahoma Railway Company* v. *St. Joseph's Parochial School et al.*, 33 Okla. 755, 127 Pac. 1087, the Supreme Court of Oklahoma again examined and considered the franchise of the Oklahoma Railway Company. The St. Joseph's Parochial School was a sectarian school, conducted by the Catholic church. The Corporation Commission of the State had ordered the railway company to carry children going to and from such school at 2½ cents each. The railway company contended that provisions of Section 7 of the franchise requiring school children to be carried for 2½ cents each applied only to children under 15 years of age in actual attendance upon "the public schools in said city," and that St. Joseph's Paro-

chial School was not a "public school." Of the franchise ordinance, the Court says:

> "This section was ratified by the Legislature of the Territory of Oklahoma by Act of March 16, 1903."
>
> Session Laws 1903, p. 141 quoted, *supra.*

It then considers what constitutes a public school, and concludes that St. Joseph's Parochial School is a public school; and while recognizing that the Corporation Commission had entered the order upon the theory that it had the right to regulate the rates of the railway company, the Court says that an order on appeal from the Commission will not be vacated "if the record shows proper ground to sustain same, though the Commission in entering the order proceeds upon a theory unsustainable under the law."

The following is from the opinion:

> "The order of the Commission was entered upon the theory that it had the authority to regulate the rates to be charged for the appellant. The Commission had no such power when it has the effect of impairing the franchise brought about by the Legislature of Oklahoma Territory. That question is unequivocally settled by the Supreme Court of the United States in *Minneapolis* v. *Minneapolis Street Railway Company,* 215 U. S., 417, 54 L. E. I. 259."

It thus appears that the Supreme Court of Oklahoma has twice, when the contract character of the Railway Company's franchise ordinance has been drawn in question, held such ordinance to be a contract; in one of such cases expressly recognizing that such contract may not be constitutionally impaired. In another case, *Enid City Railway Company* v. *City of Enid*, 43 Okla. 788, involving the franchise ordinance of Enid Railway Company which the Court in its opinion states is *in identical terms* with that of the Oklahoma Railway Company, the State Supreme Court likewise recognized and gave effect to such contract, and held void an ordinance of the City of Enid, attempting to enlarge the paving burden specified by Sec. 4 of the franchise ordinance.

Another case, that of *Oklahoma City* v. *Shields*, 22 Okla. 265, incidentally dealt with the franchise ordinance of the Railway Company, and held that the paving burden therein fixed could be enlarged by statute, unless the ratifying act of 1903, quoted, *supra*, had the effect of making the franchise contract inviolable. In the Enid case, *supra*, the Court, referring to the Shields case, states that it was submitted to the trial court upon an

agreed statement of facts; that the railway company was not a party to that suit, and, of course, its rights could not have been directly adjudicated, despite which fact "the rights of the railway company and the construction of its contract or franchise were discussed as though they were directly involved, though the judgment rendered therein could not have been enforced against it." The Court says of that case: "The authorities quoted from and relied upon by the Court do not sustain the conclusion reached, so far as the construction placed upon the provisions of the contract relative to paving, which were incidentally involved in that case." The Shields case had held that the provisions of the paving law requiring the railway company to do or pay for paving in excess of the amount of paving provided by Sec. 4 of the franchise ordinance could be enforced against the railway company, despite the franchise provision, upon the theory of the case of *Sioux City Railway Company* v. *City of Sioux City*, 138 U. S. 105. But the State Supreme Court in the Enid case pointed out that in the Sioux City case the right had been expressly reserved to alter such franchise ordinances, whereas, under the laws

of the Territory in force at the time of the granting of the Enid ordinance, no such power had been reserved, and the only authority which had been reserved had been to alter the charter of the corporation and not the contracts made by such corporation—the two being recognized as being quite distinct.

In view of the fact that the Shields' case, *supra*, is quoted from and relied upon, in the opinion in the present case, the Court is asked to bear in mind what is above said respecting that case.

What, in fact, is decided by the State Supreme Court in this case with reference to the constitutional questions presented respecting the impairment of the franchise contract and the dedication contract?

All that can be referred to the subject in the opinion appears in the following quotation:

> "Counsel urge in support of the contention that the strip of land in question is not subject to assessment for street improvements: (1) The limit of the burden which the statute permits to be imposed upon the railway company with respect to paving is to require it to pave between the tracks and a narrow space

on either side of same, as provided by Sec. 722, Rev. L. 1909, the franchise ordinance of the city, and the dedication of such private right-of-way. * * *

"The section of the statute, as well as the ordinance and deed of dedication, referred to under the first proposition urged, and the authorities cited by counsel in support of this proposition, have reference to street paving along the surface of which the tracks of the railway company are laid, and the space actually occupied as a right-of-way over which the railway company has an easement only. They have no application to a private right-of-way 40 feet in width in which the railway company owns the fee, and along the center of which the tracks are laid. In the case of *Oklahoma City* v. *Shields*, 22 Okla. 265, 100 Pac. 559, in discussing the assessment against the right-of-way of a railroad it was said:

" 'These railroad companies do not own their several rights-of-way, but simply occupy them and have easements therein obtained from the public. If in any case they have purchased and own the land occupied by and adjoining the right-of-way, there is no reason why in such cases the assessments should not be made against the land so owned, and in this event the plan of assessment would be the same as against the individual—the natural person. This rule applies equally to street railways who own any portion of their right-of-way and abutting lands.'

"The fee title to the strip of land in question here appears to be in the railway com-

pany. In the dedication to the city this strip was referred to in the following language:

"'Said strips of land are set aside for the exclusive use of and dedicated to the Oklahoma City and Surburban Railway, its successors and assigns, with like affect as though deeded and conveyed to said company in fee simply by separate deed."

Respecting the statement of the first contention of the Railway Company appearing in the foregoing quotation from the State Court's opinion, fairness to the Railway Company requires saying that it is inaccurate and inadequate, and furthermore, that it attempts to combine into one, three entirely distinct, unrelated contentions made by the Railway Company concerning three entirely distinct matters.

In the first place it was never intended to urge that the "limit of the burden which the statute permits * * * is to require it to pave between the tracks and a narrow space on either side of the same as provided by * * * the franchise ordinance of the city, and the dedication. * * *"

The section of the statute referred to by the court makes no mention whatever either of the

franchise ordinance of the city or of the dedication. It would obviously have been fatuous therefore to urge that the statute limited the burden to that provided in the franchise or in the dedication.

It *was* urged that the limit of the burden which the statute permits was that provided by Section 722, Comp. Laws of Oklahoma, 1909, which in Rev. Laws of Oklahoma, 1910, appears as Sections 610, 611 and 612. That section made provision as to what might be required of the Railway Company under the exact physical conditions existing in this case. The city had not in these proceeding required the Railway Company to do these things. So, it was contended that since the statute had fixed the burden, such fact, by implication, excluded the power to lay other burdens. The court overruled this contention. That being a matter of State statutes exclusively, the issue on this phase of the first contention as stated is foreclosed.

The other two contentions combined in this statement were those which are made herein: (1) that the franchise ordinance is impaired, and (2) that the dedication contract is impaired.

The first contention was and is broader than

is implied in the opinion, being, that with the subject of paving in mind the parties entered into the franchise contract and there outlined and fixed the burden of the Railway Company with regard to this subject, and that so doing is tantamount to a declaration that no greater burden can in any point or particular be laid upon the Railway Company. This question is not discussed or referred to in the opinion of the Court below. Its solution cannot be made to depend on either the quantum, quality or source of its title to its right of way. Obviously that court did not apprehend what the Railway Company really contended, because in support of its statement that the statutes and franchise ordinances and deed of dedication have no application to a private right-of-way 40 feet in width, the court quotes from the Shields' case above referred to, in which it is said (not in the opinion of the Supreme Court, but in the conclusions of law of the District Court):

> "If in any case they have purchased and own the land occupied by and adjoining the right-of-way, there is no reason why in such cases the assessments should not be made against the land so owned;"

and in which it is further said:

"This rule applies equally to street railways who own any portion on of their right-of-way and abutting land."

This conjunction of "right-of-way and abutting land" indicates that the statement from the Shields' case (which by the way involved only street surface paving and which is no way was called upon to treat the liability of either a railway or street railway company under any such physical condition as exists in this case) had reference to the *combination* of the *right-of-way with abutting* land, and did not contemplate dealing with a right-of-way as separate and distinct from abutting lands. In this case the Railway Company owns only its private right-of-way strip. It owns no "land occupied by and adjoining the right-of-way." If the Railway Company had purchased and laid its tracks upon, say, the southernly portion of the south tier of lots in Blocks 18, 25, 32 and 39, as shown in the plat (Tr. p. 56), the condition obviously contemplated by what is quoted from the Shields' case would exist. That condition existed in the case of *L. & N. R. Co.* v. *Barber Asphalt Pav. Co.*, 197 U. S. 432. This court there pointed out that the legislature "may say

that it is enough that the land could be turned to purposes for which the paving would increase its value." But such a statement cannot be made with reference to the private right-of-way of the Railway Company here. Its private right-of-way strip is in the middle of the platted street and no accumulation of judicial opinions can change this fact. The strip is described in the dedication as "being 20 feet on each side of the center line of Shartel Boulevard as platted * * * in said addition." Under the statute under which this dedication was made this strip can be used only for the laying of tracks. Furthermore, its physical limitations prevent its use for any other purpose than a double track street railway line, to which purpose, "and no other use and purpose whatever" it can be devoted. Rev. L. 1910, Section 511, quoted, *supra*. This strip not being, therefore, of the character obviously referred to in the Shields case and the land against which the assessment is here sought to be levied not being of the character of "land occupied by and adjoining the right-of-way," the entire structure of the court's reasoning is shown, either to have been based upon a failure to observe the contention made or else to have been based

upon mistakenly assumed premises directly contrary to the facts.

Furthermore, to show that the Shields' case does not purport to uphold any such doctrine as it is cited to support, the following from the opinion in that case, 22 Okla. 297, is quoted:

> "The court below was in error in holding that the street railway company was released or exempted by the provisions of the ordinance from assessment for the *two feet of paving* on each side of its tracks, unless Section 3, Art. 4, Ch. 9 p. 141, Sess. Laws Okla. 1903, which provides that: 'All licenses or franchises heretofore granted to any street railway company authorizing the construction and operation of an electric street railroad in any city of the first class in the territory of Oklahoma, and, which have not become forfeited or lapsed by their terms, are hereby ratified, legalized, and confirmed,' changes the rule. As the street railway company is neither a party to this action, nor has it made any appearance hereto, we decline to pass upon the proposition, and reserve our determination thereon; this point having neither been argued nor briefed before this court in this case."

The only question for decision and all that was really held in the Shields case was that the Railway Company could be compelled to pay for the two feet of paving lying outside its tracks as required by statute "unless Section 3 of the 1903

Act of the Territorial Legislature * * * changes the rule," and had the effect of making the franchise ordinance an inviolable contract. The court there finally refused to pass upon the effect of this ratifying statute. But when its effect was squarely presented in the Enid case, it was held that the franchise burden could not be increased. This was held in face of the contention made in that case, and which was made by the Paving Company in this case in the court below, that the franchise and dedication had not said that no greater burden than that fixed could be imposed.

Thus not only has the Supreme Court of the State failed to observe or apply the contentions of the Railway Company, but it has based its action upon an overruled case without citing or discussing the case which overruled it.

It is, therefore, believed that it is correct to say, despite the above quoted statements made in the opinion of the court below, that the Oklahoma Supreme Court has not construed the contract of the Railway Company either under the franchise or under the dedication. In no event can it be said that the court below has passed upon the contentions of the Railway Company as to the effect of its contracts. It is hence not thought that this

court will, under the circumstances, feel itself inclined to affirm the judgment of the State Court on the general theory of its inclination to follow the lower court's construction. But even if the State Court can be said to have construed the franchise ordinance, the matter is subject to review in this court; while, if it can be said to have construed the dedication contracts, which were made with reference to these identical private rights of way, the matter is not only reviewable by this Court, but the construction is palpably based on an erroneous idea of the facts which destroys its effect.

In *Northern Pacific Railway* v. *Duluth*, 208 U. S. 583, this Court, at page 590, says:

> "In cases arising under this clause of the Federal Constitution this court determines for itself whether there is a contract valid and binding between the parties, and whether its obligation has been impaired by the legislative action of the State. *Stearns* v. *Minnesota*, 179 U. S. 223, 233. If the plaintiff in error set up a claim of contract upon substantial grounds and with allegations showing an impairment of its obligation by state or municipal legislation, a case was presented which might be brought to this court in event such legislation was upheld. *Chicago, Burlington & Quincy R. R. Co.* v. *Nebraska*, 170 U. S. 57."

In *Detroit United Railway* v. *Michigan*, 242 U. S. 238, at page 249, it is said:

> "It is too well settled to be open to further debate, that where this court is called upon in the exercise of its jurisdiction to decide whether state legislation impairs the obligation of a contract, we are required to determine upon our independent judgment these questions: (1) Was there a contract? (2) If so, what obligation arose from it? and (3) Has that obligation been impaired by subsequent legislation? *Houston & Texas Central R. R. Co.* v. *Texas*, 177 U. S. 66, 77; *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 147; *Terre Haute etc., R. R. Co.* v. *Indiana*, 194 U. S. 579, 589."

So, the two claims to protection under the contract clause will be presented herein as independent of anything said in the opinion of the court below, and as questions to be determined by this court for itself.

It stands admitted and judicially declared by the court of last resort of the State of Oklahoma, that this franchise is a contract. Hence, this Court is relived of the burden of determining that question. It cannot be disputed, if the obligation of that contract is as is herein contended, that this obligation is impaired by the making of the assessment ordinance, which the City authorities are mandamused to make in this case. The single

question, therefore, to be determined on this phase of the case is, what is the obligation of this franchise contract?

No avoidance of this question, no misconception of the propositions urged or of the facts in this connection prevent the decision of the court below having the effect of denying the Railway Company protection under the contract clause. It is contended that the obligation of the Railway Company on the subject matter of paving, under any physical condition respecting its right-of-way space occupied by its tracks, under whatever right occupied is that stated in the franchise and that this is the limit of its burden.

Nothing is said in the lower court's opinion which affects in any respect the authority of the Enid case. In fact, the Enid case is not referred to by the court below. It must, therefore, be considered as an authoritative pronouncement of the law of the State at this time. In view of this fact, the Railway Company lays particular stress upon that case. It arose over the attempt of the City of Enid to recover from the Enid Railway Company the cost of that portion of the paving required by the statutes to be laid or paid for by the Railway

Company in excess of that which the Railway Company by its franchise is required to lay or pay for. The Railway Company defended on the ground that its paving duty had been fixed by the franchise ordinance, which constituted a contract, and which would be unconstitutionally impaired under both State and Federal Constitutions by the imposition of a greater or different burden.

The State Supreme Court, after referring to the 1903 Territorial Act quoted, *supra*, said:

> "Under this section, it cannot be doubted that the City of Enid was authorized to pass the ordinance in question. That such ordinance, when accepted by plaintiff in error, the terms and conditions thereof complied with, and the street railway lines constructed thereunder, constitutes a valid contract must be admitted. *City of Chicago* v. *Sheldon*, 9 Wall. 50, 19 L. Ed. 594; *Ry. Co.* v. *City of Savannah* (C. C.), 30 Fed. 646; *State* v. *Ry. Co.*, 85 Mo. 263, 55 Am. Rep. 361; *District of Columbia* v. *Ry. Co.*, 4 Am. & Eng. R. R. Cas. 174; *Farrar* v. *City of St. Louis*, 80 Mo. 379; *New Orleans Gaslight Co.* v. *Louisiana Light Co.*, 115 U. S. 660, 6 Sup. Ct. 252, 29 L. Ed. 516; *Greenwood* v. *Freight Co.*, 105 U. S. 13, 26 L. Ed. 961; *New Jersey* v. *Yard*, 95 U. S. 104, 24 L. Ed. 252."

By reason of the contention that the franchise ordinance of the Railway Company here is not applicable because relating to street surface paving,

whereas the instant assessment is attempted to be laid against the Railway Company's private right-of-way as abutting property for benefits, the following quotation from the Enid opinion is most pertinent:

> "It is said, however, that the contract in question does not expressly exempt the street railway company from other burdens; neither did the city agree not to impose other burdens. We do not so construe the language of the ordinance. The language of the section of the ordinance quoted, *supra, is equivalent to saying that the said street railway shall pave six and two-thirds feet for each track, and where it has double tracks, the space between such tracks, and no more. This is one of the conditions upon which the franchise was granted and accepted.*"

In the paving proceedings here involved, the Railway Company was not required by the City to pave between its tracks on this right-of-way as provided by Section 4 of the franchise ordinance. But the franchise ordinance dealt with the subject of paving, and fixed the duty of the Railway Company on this subject; and the last above quoted portion of the opinion in the Enid case declares that this duty "and no more" measures the liability of the Railway Company respecting this subject. Not only is this true, but the principles so announced are

supported by numerous authorities cited by the court in the Enid opinion, which the Railway Company relies on here, as, for example, *City of Chicago* v. *Sheldon*, 9 Wall. 50, and *Coast Line R. Co.* v. *City of Savannah*, 30 Fed. 646, from the opinion in each of which cases the Court quotes.

The State Supreme Court concludes its discussion in the Enid case as follows:

"Neither the Legislature nor the city of Enid reserved the power generally or specifically in the franchise in question to modify by adding additional burdens, or to abrogate the contract, and it was not within the power of the Legislature or the city of Enid to impair the obligation of such contract in the manner attempted in this case. If the city of Enid could require the railway company to pave 26 inches in addition to the amount agreed to be paved, contrary to to its consent, and in violation of its contract, then it could require said railway company to pave thirteen feet, should the public good require it; or, if the contract can be violated in this respect, it can in any other respect, and it will be seen that this is clearly in violation of the provisions of the Federal Constitution. As a policy of the government, what the city undertook to do in this case, as applied to the situation, may be very just and equitable; but with this the court has nothing to do. The court cannot inaugurate policies; neither can it assist in carrying them into effect, when contrary to sound rules or the organic law, and

when clearly in contravention of the Federal Constitution.

"From the foregoing we are of the opinion that the Act of the Legislature of 1908, and Ordinance No. 596, passed in pursuance thereof, attempting to collect from defendant the cost of making additional pavements other than it agreed to make, were an impairment of the obligation of its contract, and prohibited by the Federal Constitution. Therefore, the judgment of the trial court is erroneous and must be reversed, with direction to set aside the judgment and proceed in accordance with this opinion."

In the case of *City of Chicago* v. *Sheldon*, 76 U. S. (9 Wall.), 50, 19 L. Ed. 594, the provision of the charter involved was as follows:

"The said company shall, as respects the grading, paving, macadamizing, filling or planking of the streets, * * * upon which they shall construct their said railways, or any of them, keep eight feet in width along the line of said railway on all the streets whenever one track is constructed, and sixteen feet in width along the line of said railway (on all streets) where two tracks are constructed, in good repair and condition during all the time to which the privilege hereby granted to said company shall extend."

Thereafter, the city attempted to charge the street railway company with additional paving. The Supreme Court said:

"Now, it is quite clear that the above re-

citals embrace the whole subject of improvements of the streets, and that it was present to the minds of the parties when entering into the stipulation respecting repairs that followed. And this being so, it is difficult to deny but that these stipulations were made as fixing the proportion or share of these general improvements which should be imposed on the company."

It was further said in the syllabus:

"Where a contract is valid at the time, by the laws of the state, its Legislature cannot pass an act impairing its obligation, nor can any decison of its court have that effect."

The principle of the Shelton case is, without citation thereto, however, that which controlled *Wright* v. *Georgia R. R. & Banking Co.*, 216 U. S. 420, where the court considered a charter grant of execution from taxation, said (p. 432):

"We are, therefore, of opinion that this property is not subject to any other method of taxation than that of the special system stipulated for by the contract. * * * ."

The opinion in the Sheldon case is followed in the case of *Coast Line R. Co.* v. *City of Savannah*, 30 Fed. 646. There it was held that the City of Savannah possessed under the general law of the State power to enter into the contract, just as it has been held with reference to ordinance 281, that it

was a contract which the City was competent to make, or, rather, was one which had been ratified by the subsequent act of the Territorial Legislature.

The Court said:

> "The City of Savannah and the railroad company, by virtue of their respective charters, had the power to contract, and they did contract. They contracted in these words:
>
> "'In event of the paving by the city of the whole or any portion of the streets used by said railroad company, the portion of the track between the rails shall be paved and kept in good and thorough repair by the company, at its own expense and cost.'
>
> "This was the limit of the paving to be done by the company. '*Expressio unius est exclusio alterius.*' This maxim is never more applicable than when applied to the interpretation of a statute. In construing this contract, it is the necessary presumption that the railroad company agreed, in consideration of the privileges granted it by the city, to pave between its tracks, and no more; and this obligation is as binding on the city as it is on the company. Therefore a subsequent act of the legislature, requiring it to pave a lateral addition of six feet, bears on the contract to the advantage of the city and to the injury of the company, and 'impairs the obligation.'"

The court then quotes from the opinion in the Sheldon case the following:

"That section prescribes the obligations and duties of the company in respect to the condition and repairs of the streets during the whole period of the running of the contract, and imposes certain burdens upon it as to repairs, from which, to their extent, the city or adjoining owners of lots are relieved. It is insisted that this provision was intended, and so understood by both parties, as regulating the whole subject as respects improvements of the streets occupied by the company, and to fix in the contract the extent of their liability. The language of it is somewhat peculiar, and it cannot be well denied but that a fair and reasonable interpretation favors this view."

What is said by the Federal Court in the Savannah case may with equal emphasis and applicability be said with reference to the instant case, viz.-

"There can be no difference in principle between this case, the authority of which is controlling in this court, and the case in hand. Here, as there, the clause in the contract, restricting the obligation of the railway company on the subject of the improvement of streets, 'embraced the whole subject,' and the share or proportion to be borne by the company is fixed by that clause. The agreement was 'valid at the time by the laws of the state,' and it is not competent, say the supreme court, 'even for the legislature to pass an act impairing the obligation.'"

In *State ex rel. Street Ry. Co.*, 58 Mo. 263, 276, 277, (55 Am. Rep. 361) the same question was involved. The court said:

> "The only condition of burden affixed to the privilege given by the ordinance to it to construct and operate its road was that it should keep and maintain the space between its rails and a space of two feet on either side of the line of its track and all street crossings along its line in good repair. The obligation to repair a street is one thing and and the obligation to reconstruct a street is another and different thing. To repair a thing is to restore it to a sound state after decay, injury, dilapidation, or partial destruction. To reconstruct is to construct or build again. One who only assumes an obligation to repair a house could not be required to tear it down and rebuild it. Without torturing the language of section 4 of the ordinance of 1869, and turning it away from its ordinary meaning, we cannot construe it so as to impose on defendant an obligation to reconstruct a street, when in express terms it says the street shall be maintained and kept in good repair."

In the case of *West Chicago Street Railway Company* v. *City of Chicago*, 178 Ill. 339, 53 N. E. 112, the Supreme Court of Illinois referred to the Sheldon case and followed the principle there announced. With reference to ordinance there under consideration the court said:

"This ordinance covers the whole subject, and provides that 'as respects the filling, grading, paving and otherwise improving and repairing the streets or parts of streets on which it has constructed its railways, or any of them,' the railway company shall perform a certain part of the work. The language can only be construed as fixing and specifying the duties of the railway company in regard or with respect to all such improvements; and it means that, when the company constructs its railway through a street or a part of it, it shall fill, grade, pave and keep in repair the width specified."

In the case of *Western Paving & Supply Co.* v. *Street Railway Company*, 128 Indiana 525, 26 N. E. 188, 28 N. E. 88, the Savannah and Sheldon cases were cited and quoted from with approval as was also the case of *State* v. *Railway Company*, 85 Mo. 263, which was said to announce the same doctrine. In the case of *Provisional Municipality of Pensacola* v. *Northrup*, 66 Fed. 689, the Circuit Court of Appeals, Fifth Circuit, the case of *Chicago* v. *Sheldon, supra*, was followed. The syllabus reads:

"A street-railroad company, operating under an ordinance requiring it to keep 'in good condition' the street between its rails and one foot each side thereof, was required by a

subsequent ordinance to pave the street to the same extent. The company accepted this ordinance, agreed to pay the town the cost of such paving, and consented that such cost should be a lien on its property. After the passage of the ordinance, but before the date of the agreement the company issued and sold its mortgage bonds. *Held*, in a suit to foreclose the mortgage bonds, that the city had no lien for pavements laid under the ordinance and agreement. *Chicago* v. *Sheldon*, 9 Wall. 50, and *Railroad Co.* v. *Hamilton*, 10 Sup. Ct. 546, 134 U. S. 296, followed."

In the case of *Boise Water Co.* v. *Boise City*, 230 U. S. 84, the following syllabus states the law:

"The municipal ordinance of a town in Idaho imposing additional obligations on a corporation holding by assignment an easement granted by a former municipal ordinance within fifty years for use of the streets for water mains *held* an unconstitutional impairment of the obligation of the contract of the former ordinance."

In that case the predecessors in interest of the Boise Water Co. have been granted the right to lay water mains and construct a water system in the streets of the city. It was pointed out that the grant was made in contemplation of the investment of large capital in the construction of a

system of water works for the permanent supply of the city with water. Of the city, the court said:

> "What it undertook to do was to grant to those who proposed to construct and maintain works for that purpose the right to 'lay and repair' their distributing pipes along the streets of the city. * * * The original grant of street rights was assignable on its face and was made to individuals."

It was claimed that the grant was a mere license and therefore, revocable at the will of the city and that the attempt by the city to impose upon the water company a license tax was therefore justified. The court said:

> "The plain effect of this later ordinance was to impair the obligation of the contract resulting from the ordinance conferring the street easement."

In the case of *Village of Madison* v. *Alton G. & St. L. Traction Co.*, 235 Ill. 346, 85 N. E. 596, the city had entered into a contract, in the form of a franchise ordinance with the traction company requiring it to 'pave with macadam' the portion of the street required to be paved. Thereafter it passed an ordinance attempting to lay upon the railway company the burden of paving such portion with brick. The court held the latter ordinance void as impairing the obligation of the contract. The fol-

lowing is copied from the opinion of the court:

> "*City of Chicago* v. *Sheldon*, 9 Wall. (U. S.) 50, 19 L. Ed. 594, cited and commented upon in *West Chicago Street Railroad Co.* v. *City of Chicago, supra*, sustains the conclusions we have reached in this case. So, also, does *Shamokin Borough* v. *Shamokin Street Railway Co.*, 178 Pa. 128, 35 Atl. 862. In that case the ordinance required the street railway company, at its own expense, to maintain and keep in good repair 4½ feet in width on either side of the center of its track, or a roadbed of 9 feet in width, upon all the streets where its tracks were laid. The ordinance provided that in maintaining and keeping in repair said 9 feet in width the railway company should use the same kind of material used by the borough authorities or such other material as was approved by said authorities, and, upon giving the railway company 15 days' notice of the intention of the authorities to repair or macadamize any of the streets over which said railway passed, the company was required to macadamize or repair said 9 feet, and, upon its failing to do so the authorities might do the work and recover the cost, with a penalty of 20 per cent added. The authorities decided to repair and pave the street with asphaltum, and gave notice to the street railway company to repair and pave its portion with that material. The company disregarded the notice, and the authorities did the work, and brought suit to recover the cost thereof. The street railway company defended its action in refusing to do the wrk with asphaltum or

pay for it when done by the authorities with that material, on the ground that it was not bound by the ordinance to pave with asphaltum; that the authorities having adopted a different pavement from that provided for in the contract, the street railway company could not be held liable for the cost of making this pavement. In passing upon this question the court said: 'If a macadam pavement had been adopted, the railway company would have been bound to join in putting it down or to pay the cost to the borough, with a penalty of 20 per cent. added. But the borough substituted another kind of pavement which defendant had not contracted to be liable for. In so far it exceeded its authority under the contract, and to the extent of this excess it cannot relieve the borough treasury by calling on the defendant under the terms of the ordinance."

In the case of *City of Moline* v. *Tri-City Railway Co.*, 262 Ill. 122, 104 N. E. 271, the third syllabus states:

"The franchise ordinance of a street railway company declared that, when the city council should order the paving of any of the streets upon which its railway was located, the company should properly pave between its tracks and for four feet from the center of each track, in the same manner and with such paving material as the city council should direct. This ordinance further declared that the street railway company should provide proper surface or underground drainage. *Held,*

that, by imposing this burden on the street railway company, it was exempted from special assessments for the improvement of the street, and this exemption included assessments for the construction of a storm drain which was part of the system of pavement."

The same principle is announced in the *State* v. *Mayor etc. of City of Paterson*, 67 N. J. L. 199, 50 Atl. 620. There the Paterson Railway company was operating under a franchise in which the language hereinafter quoted appears. The street was ordered to be repaved and the bordering property owners contested the assessment on the ground that the commissioners failed to assess benefits against the railway company. The court says:

"The ordinance in question expressed the duty of the company with regard to the surface of streets to be occupied by it in these words: It 'shall keep and maintain so much of the streets or avenues as are inside of and for at least two feet adjoining the outside of said rails in good and sufficient repair,' etc. There was evidence tending to show that after the railway tracks were laid the city paved the streets in question with macadam, which had become worn and out of repair, particularly in that part about three feet from the railroad track. The re-paving was done with red brick laid in concrete, and was recognized as an improvement of a per-

manent and substantial character. We think this ground of the prosecutor cannot be maintained. To do so we must give a meaning to the word 'repair,' which does not ordinarily attach to it and we would have to depart from the line of legal precedent. In the leading case of *City of Chicago* v. *Sheldon*, 9 Wal., 50, 19 L. Ed. 954, it was held that a stipulation on the part of the street railway company to keep the street in constant good order and repair did not require it to pay a proportion of the expense of paving. And generally it is held that an obligation to repair a street is not an obligation to construct thereon a new pavement. *District of Columbia* v. *Washington & G. R. Co.*, 4 Am. & Eng. R. Cas. 174; *Farrar* v. *City of St. Louis*, 80 Mo. 379; *City of Philadelphia* v. *Hestonville M. & F. P. R. Co.*, 35 Atl. 718, 177 Pa. St. 371; *Same* v. *Philadelphia City Pass. R. Co.* (Pa.), 35 Atl. 720; *City of Binghampton* v. *Binghampton & P. D. Ry. Co.*, 61 Hun. 479 N. Y. Supp. 225, 23 Am. & Eng. Enc. Law, 989, and note 1."

McChesney v. *City of Chicago*, 213 Ill. 595, 73 N. E. 368, is an excellent illustration as to the limitations impliedly imposed by a franchise ordinance which expressly enumerates obligations with reference to improvements. The improvement involved the laying of water supply pipes under a special assessment statute. The city council did not assess the street railway for benefits, the theory being that it was not subject to the

general provisions of the law as its franchise provided the measure of its obligations. The court says:

> "It is also objected that the right-of-way of the South Chicago City Railway Company should have been assessed. The ordinance granting the right-of-way to that company provided that it shoul pave and keep in good conditon and repair all streets in which its tracks should be laid, eight feet in width where there were double tracks, and when any new improvements to said streets of parts of streets should be ordered by the city council, the company should in the manner required of property owners, make such improvements for the width of 8 feet where a single track should be laid and 16 feet where double tracks should be laid. A proceeding for the purpose of improving a street may include other than surface improvements (*Town of Cicero* v. *Green*, 211 Ill. 241, 71 N. E. 884); but in this case the contract clearly relates only to surface improvements for the width of 8 feet where there is a single track and 16 feet where there are double tracks. The obligation assumed does not include a water supply pipe laid under surface, and in this case it is to be laid on one side, and apparently not within the width limited by the ordinance granting the right of way."

And so the cases might be multiplied. It is sufficient, however, to say that in the brief of the

paving company in the State Supreme Court, not one authority was cited, other than from jurisdiction in which the State had, prior to the grant thereof, expressly reserved the right to alter what may be termed secondary franchises, which held that where the subject matter of an obligation to be performed by the grantee of a franchise had been dealt with in the franchise ordinance, such obligation could be enlarged. On the contrary, it is probably accurate to say that wherever the question has arisen, the courts have recognized and applied the maxim, *expressio unius est exclusio alterius*, as was done in the Savannah case. The logical principles underlying this maxim are unassailable; for when the parties to a contract have a given subject matter in mind, as, for example, paving burdens, and with such subject in mind stipulate as to the respective rights and duties of the parties as to such subject, as was here done both in the franchise and in the dedication, it must be concluded that they have by such stipulation wholly provided as to their mutual rights and liabilities regarding such subject.

The applicability of the foregoing principles and considerations is not affected, it is submitted,

in any respect by the fact dwelt on in the opinion, that on Linwood Boulevard the tracks of the Railway Company are laid on a private right-of way, separated by a curb from the double driveways between which it lies, nor is it affected by the quantum or quantity of the estate which the railway company has in the space occupied by its tracks.

As above pointed out, and as cannot be disputed, the right-of-way lies in and is platted as a part of Linwood Boulevard. The dedication fixes this fact. It is used for exactly the same purpose as the easements in the surface of the down town streets, viz: the transportation of the public. The Linwood Boulevard line is a part of the "system of electric street railroads" maintained "in the streets * * * * of the city of Oklahoma City as hereafter extended" within the contemplation of section 1 of the franchise ordinance. As to this line there can be no question but that the city, pursuant to the authority reserved in Section VI of the ordinance has "the power of passing ordinances regulating the use of headlights, gongs and fenders and all other needful rules and regulations for the protection of the inhabitants of said city in

connection with the operation of said railway." That provision of said section requiring the cars to remain standing until the fire engine shall have passed, in the event of the sounding of the fire alarm, is obviously applicable to the operation of this right-of-way line. There could be no question but that the profits from this line would be participated in by the city under the provisions of Section XII of the franchise; nor can there be any question but that the city in the exercise of its privilege of purchasing "the entire plant of said railway company within the corporate limits of said city" would have the right to acquire this private right-of-way strip and the tracks thereon. It, therefore, appears that the Railway Company has, since the limits of the city were extended to include this territory, operated this line under and pursuant to the franchise granted to it. How then can it be reasonably urged that of all the provisions of the franchise only that relating to paving is ineffective as to it?

Is any invidious distinction against this line, as respects paving, to be logically based upon the holding that the Railway Company owns the fee of the right-of-way while it only has an easement

in the streets in the surface of which its lines are laid? *None*, it is submitted.

In each case the duration of its right is identically coterminous. Under the authority of *Boise Water Co.* v. *Boise City*, 230 U. S. 84, this franchise ordinance is a grant in perpetuity. The right to occupy the street surface for tracks therefore continues while the use continues. Exactly the same is true of the private right-of-way, which can be used for no other purpose than the laying of and operation over, street railway tracks, and which, when this use is abandoned, reverts to the grantor, as the Oklahoma court holds in *Santa Fe, L. & E. R. Co.* v. *Laune* (not yet officially reported) 168 Pac. 1022. The second syllabus reads:

> "An instrument which is in form a general warranty deed, conveying a strip of land to defendant company for a right of way for its railroads, under the facts in this case, did not vest an absolute title in the railroad company; but the interest conveyed is limited by the use for which the land is acquired, and, when that use is abandoned, the property will revert to the original owners."

A Street Railway is a "railroad" company under Oklahoma Statutes. R. L. Okla. 1910, Sec. 1842.

In each case, furthermore, the purpose served is identical. The same kind of cars and tracks are used. The same public is carried, and for the same fare, with the same transfer privileges—all being done in accordance with the franchise ordinance.

In the premises, then, it is illogical to say that the difference between "easement" and "fee" can make any difference as to the limiting effect of the paving provision of the franchise.

The opinion of the State Supreme Court in this case has been cited and followed by the Circuit Court of Appeals, Eighth Circuit, in an opinion filed April 28, 1919, which as yet appears only in MSS., *Oklahoma City* v. *Orthwein*. The Railway Company was not, however, a party to that action. Furthermore, the constitutional questions here presented were there neither presented nor discussed. The court merely announced itself bound by the State Court's construction of statutes of the State.

If it should be contended that the legislative authority was not competent to authorize a contract limiting the taxing power, that contention is not only met by the decison in the Enid case, *su-*

pra, (as to special assessments) but is met further in Oklahoma in the case of *In re First State Bank* (not yet officially reported), 160 Pac, 469, (as to general taxation) of which the 9th syllabus states the law:

> "The constitutional inhibitions, both state and federal, against impairing contract obligations, is a limitation upon the taxing power, as well as upon all legislation, whatever form it may assume."

It is, therefore, urged that under the principle hereinbefore stated the order of the State Court requiring the levy of the mandamused assessment impairs the obligations of the franchise contract.

SECOND.

In no event can a greater burden be imposed upon the railway company respecting paving, insofar as its private right of way is effected, than the burden provided in the dedication of such private rights of way, such dedication being made when the land in question was farm property, not within the city limits, the area included within such dedication having been subsequently taken into the city with knowledge of the restrictions contained in the plats and dedications, such restrictions and conditions having been the inducement of the railway company to build in these outlying districts, and constituted contracts which would be impaired in violation of both State and Federal Constitutions by the imposition of any or other greater burden as to paving than the plats and dedications provide for and require; and the Supreme Court of Oklahoma erred in not so holding.

What is said in the foregoing first subdivision of the argument concerning the construction of a contract which deals with a given subject matter and fixes what the duties of the parties shall be in relation thereto, is equally applicable under this subdivision of the brief.

Here, the owners of the outlying territory, largely uninhabited, and of which the witness Shartel at the trial testified, "when the Oklahoma Railway or the Suburban Railroad built into these additions, they were all wild prairie, and they are almost that yet," desired to market same for

homes. Mr. Shartel stated that he had negotiations with each of the owners leading up to the filing of the plats. On page 66 of the Transcript, is the following:

"Q. What were those negotiations, Mr. Shartel?

By Judge Ames: Objected to as immaterial.

By the Court: Sustained; I understand they are in the documents themselves.

By Mr. Snyder: Yes, but if your Honor please, the object of this question is to bring out the matter of the consideration to the railway company for going out there, and it helps interpret the plats, and the answer of the witness will show that he is prepared to answer that it was the only consideration under which the railway company would go and build this line out there; that it knew it would be losing money for a long period of time and wher it is still losing money.

By the Court: I understand the instrument itself shows the consideration. Do you desire to show that that isn't correct?

By Mr. Snyder: No, the instrument doesn't; the instrument shows what was done. Now, we desire to show the consideration.

By the Court: (After argument) I will sustain the objection.

By Mr. Snyder: Exception.

Q. Has the Linwood line of road, ever since it has been first constructed, been a paying proposition?

By Judge Adams: Objected to as immaterial.

By the Court: Overruled. I don't see what difference it makes. He may answer it.

A. It has not. The operation has entailed a very heavy loss.

Q. That loss continues to this day?

A. It does." (Tr. pp. 66-67)

The dedication provides that the Railway Company:

"Shall provide crossings over its tracks at all street crossings and when said Boulevards are paved said Company shall curb its private right of way and pave street crossings over same" (Tr. p. 53).

It is contended by the Railway Company that this dedication constituted a contract which it was competent for the parties to make, and the effect of which was to limit the duty of the Railway Company, when the street within which the private right of way lies was paved, to curbing its private right of way and paving street crossings over same, and that the obligation of this contract will be impaired by the enactment of the required ordinance assessing a large sum of money in addi-

tion to the outlay already made by the Railway Company in curbing its private rights of way and paving street crossings over same. This contention, together with a specific prayer to the protection of the contract clause, was presented in the trial court and in the State Supreme Court, where it was ignored. The State Supreme Court did not deny the power or authority of the dedicators under the Statute hereinbefore quoted, prior to the time when this land was embraced within the City, to enter into a valid and binding contract of this character. It did not deny that the construction which the Railway Company contended should be placed upon such contract is the proper one. Nor did it deny, as was contended, that the City, when it embraced the land within its limits, accepted the streets laid out by the plat *cum onore,* and became thereby bound, upon the acceptance of these streets, to the burdens and limitations imposed in their dedication. Nor did it deny that in order to relieve the streets from the burden of this contract it would have been necessary for the City, under its ordinance power to open and lay out streets, to have condemned the rights of the Railway Company under the dedica-

tion contract. On all of these questions, the opinion of the State Supreme Court is silent. It is shown that in the hereinbefore quoted portion of the opinion, the three contentions, one under the Statute, one under the franchise ordinance, and the other under the dedication, are disposed of with the bare assertion that they have "no application to a private right of way 40 feet in width in which the Railway Company owns the fee and along the center of which the tracks are laid." But, as above pointed out, this statement when applied to the dedication is patently inaccurate, because the only thing to which the dedication does refer, when it states the paving burden of the Railway Company, is this private right of way. It says that the Railway Company "shall provide crossings over its tracks at all street crossings, and when said boulevards are paved said Company shall curb its *private right of way* and pave street crossings *over same.*" So, plainly put, the statement that the "deed of edication * * * has no application to a private right of way 40 feet in width, etc.," is not the fact; that is the only thing to which the "deed of dedication" did have application.

So, under the principle hereinbefore quoted

from the case of the *Detroit United Ry.* v. *Michigan,* 242 U. S., 238, this Court will determine for itself the questions as to whether there was a contract, and if so, what obligation arose from it, and whether that obligation has been impaired by subsequent legislation, unembarrassed by any indication of the attitude of the State Supreme Court upon these questions. In fact, it is fair to say that the indication is that the Supreme Court has substantially said that if the dedications had related to these private rights of way the conclusion would have been otherwise. This is implied from what is said.

Section 511, Rev. L. Okla., 1910, quoted in the statement of the case *supra,* and the preceding and succeeding sections of Art. VIII, Chap. 10 Rev. L. 1910, empower any person who wishes to lay out an addition or subdivision to cause the same to be surveyed and plat thereof made, particularly describing and setting forth the treets, alleys, commons or public ground within the plat, and provides that when the plat or map shall have been made out and certified, acknowledged and recorded, as required by this Article, "every donation or grant to the public or any individual * * *

or corporation, or body politic, marked or noted as such on said map or plat shall be deemed in law and equity a sufficient conveyance to vest the fee simple of all such parcel or parcels of land as are therein expressed, and shall be considered, to all intents and purposes, a general warranty against such donor or donors, their heirs or representatives, to said donee or donees, grantee or grantees, for his, her or their use, *for the uses and purposes therein named, expressed and intended, and no other use and purpose whatever;* and the land intended to be used for the streets, alleys, ways, commons or *other public uses* in any town or city or addition thereto, shall be held in the corporate name thereof, in truct to and *for the uses and purposes set forth and expressed or intended."*

The Statute properly gave the right to the Linwood Place Development Company to impose conditions upon grants, whether for street or private right of way purposes, or in combination, to the Railway Company in furtherance of its public use, and to the public. The authority having by the State been granted to impose these restrictive covenants, they when accepted, became contractual rights and obligations. At the moment

the city accepted the grant of the streets, by including the addition in the city as empowered by statute, it became a party to this contract.

The case of the *A. T. & S. F. Ry. Co.* v. *City of Shawnee,* Circuit Court of Appeals, 8th Circuit, 183, Fed. 85, by analogy supports the statement just made. That was a case in which the City of Shawnee, pursuant to statutory authority vested in it by the identical Statute giving it authority to open and vacate streets, hereinafter referred to, vacated a street of the city. The vacation had been in pursuance of a contract made by the City to induce the Railway Company to locate its shops in Shawnee. The Statute provided that upon the vacation of this street, the territory embraced therein should accrete to the owners of the adjacent property. The Railway Company owned the abutting property, and upon the vacation, of course, what was formerly the street became vested in the Railway Company. The Railway Company located its shops upon its land, which had formerly been a part of the street. The City thereafter undertook to reopen the street, and the Railway Company enjoined this attempt, claiming that the vacation constituted a contract and vested

rights in it as the owner of the abutting property, and that the reopening of the street without making compensation for its rights, would impair the obligation of its contract. The City defended this action on the ground that the Legislature of Oklahoma had not the power to authorize such a disposition of a public highway of the City as purported to have been made by the vacation; and also contended that such vacation did not withdraw the street from municipal control nor preclude its use as such by the inhabitants of the City. The Circuit Court of Appeals, Judge Hook, speaking, said:

> "The power of the Oklahoma Legislature is too plain for discussion. Express authority to vacate streets was conferred by the Legislature upon the municipal council, and provision was made in the law that upon a vacation the title should revert to the owners of the adjacent property. St. 1893, p. 584; Comp. Laws 1909, S. 688; *Blackwell, etc., Ry. Co.* v. *Gist*, 18 Okla. 516, 90 Pac. 889; *Bullen* v. *Railway*, 20 Okla. 819, 95 Pac. 476.
>
> "In the first of these cases it was expressly held that when a street had been vacated, and had become attached in title to the adjacent property as provided by the statute, it could not again be taken for public use without just compensation to the owner.

> * * * * The grantee duly accepted the ordinance as its provision required, constructed its tracks and buildings on the station grounds, and its contract rights so secured are protected from impairment and its property from appropriation without due process of law by the nationl Constitution."

If rights obtained by a vacation pursuant to statutory authority are vested rights, which can not be taken without just compensation, then surely rights obtained under a dedication made pursuant to statutory authority are of like character. Furthermore, if, after having vacated the street and thereby vested the ownership thereof in the abutting property, the City would be compelled, before reopining it, to condemn the right so obtained, surely, before destroying the right obtained under the dedication, where the only right it ever had in the street was received burdened with a restrictive covenant, the City would have to condemn the rights obtained by the parties under the restrictive covenant before dealing with and treating the street as though it were untrammeled with conditions.

The City acted within its authority under Sec. 500, Rev. L. Okla. 1910, in adding this terri-

tory to the City. Under the decisions hereinafter cited and referred to, the fact of the addition of this territory to the City was impliedly an acceptance of the streets, subject to the burdens imposed in the dedication. The City had the power to open, straighten, widen, extend and otherwise improve the avenues, etc. Rev. L. of Okla. 573. But this section when construed in connection with Section 599, Rev. L. of Oklahoma 1910, required that upon the taking of private property for public use for any necessary purpose, the City should make to the person whose property shall be taken, adequate compensation therefor to be determined as provided by law for the condemnation of the property for railway purposes. So, the City, if it had desired, had ample authority under the law to free Linwood Boulevard from the restrictions and conditions of the plat, by condemning the rights which the various parties had obtained thereunder. It did not do this, however. After it had changed the name of Shartel Boulevard to Linwood Boulevard, thus again recognizing the plat which had named this street "Shartel Boulevard," it proceeded to order the paving done to the street, under such changed name. The assessment here attempted to be en-

forced against the private right-of-way is in an entire disregard of the rights of the Railway Company under the dedication, which have neither been condemned nor in any respect lawfully divested.

So far as counsel have been able to learn the precise questions involved have never been presented to this Court, though the principles which control have been applied both here and, frequently, in the State courts. This Court has held, in *Cincinnati* v. *L. & N. R. Co.*, 223 U. S. 390, that a dedication of land for public use of a city constitutes a contract between the dedicators and the city, protected by the contract clause; and that condemnation, as is above suggested, is the proper method for divesting such contract rights.

Browne v. *Palmer, etc.*, 66 Neb. 287, 92 N. W. 315, is an exact authority here. This is from the opinion:

> "The agreed statement of facts upon which the case was tried shows that Andrew J. Hanscom and James G. Megeath deeded to the city of Omaha a large tract of land now known as 'Hanscom Park,' the deed containing the following conditions: 'And for the consideration aforesaid we also hereby convey to the city of Omaha a strip of land

eighty (80) feet wide, adjoining and entirely surrounding said park, for the purpose of a public street or highway, and that said city of Omaha shall lay out and improve said street or highway, and shall forever after keep said street or highway in good order and repair at the expense of said city of Omaha; and, in case of failure or neglect to comply with any or all of said conditions, then, and in that case the title to said street or highway shall revert back and reinvest in the parties of the first part, their heirs and assigns, according to their original interests.' The sidewalk taxes in controversy in this case were, as before stated, levied and assessed against the lot for the building of a sidewalk abutting thereon and included within the 80-foot strip described in the deed from which the above quotation was taken. In *City of Omaha* v. *Megeath*, 46 Neb. 502, 64 N. W. 1091, it was held: 'Where a strip of ground surrounding a tract of land designed for a public park was conveyed by parties who owned other land outside of and abutting upon the said strip upon the express conditions in the deed of conveyance that the grantee should lay out and improve said strip as a street, and forever after keep the same in good repair and order at its own expense, such city, for improving or keeping in repair such street, *cannot require payment by its grantors because of their ownership of the aforesaid abutting property; and the same exemption from liability exists in favor of one* who has since purchased a part of said abutting property.' This is conclusive of the case at bar. The city was to improve the whole of the 80-foot strip. *Whatever street improve-*

> *ments the city may desire to make upon this tract it must make at its own expense.* The claim of the appellant that improvements to be paid for by the city should be limited to that part used for a roadway alone is contradicted by the express terms of the deed. The city must improve the whole strip so far as it desires improvements to be made thereon."

In the above case the court therefore upheld the validity of a duly accepted dedication which took away from the city the power vested in it by the statutes of the State to levy special assessments.

The case of *Bartlett* v. *City of Boston,* 182 Mass. 460, 65 N. E. 827, is also squarely an authority here when it is considered that a dedication and the conditions imposed by a dedication are equivalent under our statutes, to a deed with the same conditions. The second syllabus sufficiently state the facts and the law:

> "Where a deed to a city of a private way negotiated by the city street commissioners, contained a covenant obligating the grantee to save the grantors harmless from any street assessments for constructing a street on the way, after being executed, it was sent to the city auditor, who received it, procured it to be recorded, paid the record fee, and on its being returned, retained and listed it on the records

of deeds belonging to the city in his office, where it remained for more than six years, there was a sufficient acceptance of the deed to bind the city by such covenant."

The above case is also an authority, as indicated in the quoted syllabus, for the substantial proposition that any acts which indicate an acceptance by the city will be sufficient to bind the city to the conditions imposed. Other cases which will be cited are more particularly in point on this question; the principle being that any dealings with the property which indicate and are evidence of an acceptance of the grant, attach the conditions imposed to the grant as obligations upon the city.

Exactly holding that a condition imposed in a dedication that any special assessment for public improvement in and about the dedicated property shall be borne by the public and not by the dedicator or his successors, is the case of *Perth Amboy Trust Company* v. *Board of Aldermen*, 75 N. J. Law 291, 68 Atl. 84. The question of the power of the city to accept a dedication subject to a condition which limited its powers under the statute was squarely presented and decided. The syllabus sufficiently states the facts as follows:

"Where land has been dedicated by its

owner for street purposes as a public approach to a county bridge a condition in the deed of dedication that the expense of turning such land into such street shall be borne by the public, and not by the owners of property abutting on such street, is a valid condition, which, if accepted and acted upon on behalf of the public, operates to release such property onwers from such assessment."

In the opinion, Garrison, J., speaking for the court, says: -

"The excuse of the city for levying the assessment in question in the face of the condition of dedication which it had accepted, is that it had no power to accede to the condition upon which the land for Sheridan Street was given by its owners to the public. The claim of the city is that the dedication should stand, but that the conditions upon which it was made should be ignored. We cannot take this view of the legal situation. The condition, so far as it affected Sheridan Street being limited to a single expenditure for a specific purpose, was in effect the price the city was willing to pay for the land. If the city had power to buy the land at such sum, it had power to agree to expend such sum upon the land as the condition of its perpetual dedication to public use. After the expenditure of the sum thus required, the public have no more standing to exact payment from the abutting owners than the owners have to exact damages from the public for taking the land. Dillon on Municipal Corporations (3rd Ed., Sec. 632), and cases cited in the notes."

The case of *State* v. *Mayor, etc., of Hoboken,* 9 N. J. Law 383, 36 Atl. 693, considers a complaint of abutting property owners against a street railroad company under the following conditions: The complainants had acquired their property charged with notice of the terms of a certain dedication made before the property or the streets had been platted. The streets were dedicated as public highways for use by ordinary vehicles and foot passengers only, subject to the right of the dedicator to lay tracks for horse cars, steam cars and elevated railways, the rights as to which were expressly reserved in the dedicator. The dedicator in writing granted to the Hoboken Railroad, etc., Co., the right to construct a railroad in the streets.

The Court says:

> "Such dedication constituted the only right of the city of Hoboken in such streets. The power and jurisdiction over these streets was only obtained by such dedication."

And further says:

> "In the case of *Ayres* v. *Railroad Co.,* 48 N. J. 44, 3 Atl. 885, it was held that 'the dedication of land for public use as a highway may be made subject to the right to designate a portion thereof for use for railroad purposes, and, when such portion has been dedicated and devoted to railroad purposes, the

public use will be suspended, and remain suspended so long as that portion is devoted to such purpose; and that a conveyance of land along such highway, prior to the designation of a portion for railroad purposes, will pass the grantor's title to the center of the street, subject to the public easement and the reserved right to devote to use for railroad purposes.' "

Further in the opinion, the Court adds:

"A dedication of a highway to the public use may be made *cum onere. State* v. *Society for Establishing Useful Manufactures,* 44 N. J. Law 502. Mr. Justice Magie, in delivering the opinion in the case of *Ayres* v. *Railroad Co.,* 52 N. J. Law 405-412, 20 Atl. 54-56, says: 'The map, which was one of Brown's acts, from which dedication is inferred, showed an intent to devote part of the avenue to railroad use. Therefore it must be inferred that he intended to retain what power was necessary to effect that purpose. * * * It was sufficient that he should retain the right to devote to railroad uses such width as he and the company agree upon. * * * *If the use of the soil as a way be offered by the owner under given conditions and subject to certain reservations, and if the public accept the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred. State* v. *Society for Establishing Useful Manufactures,* 44 N. J. Law 506; *Avis* v. *Borough of Vineland,* 58 N. J. Law 478, 28 Atl. 1039."

The application of the above case and quotations to the case at bar is patent. The city could obtain by embracing this property within the city limits, no control with respect to these streets inconsistent with the grants, limitations and conditions imposed by the dedication. If the city did not desire to accept these dedications under the exact conditions imposed, it was competent for it to have condemned the property for public streets free from conditions. But the city did not pursue this right; instead it embraced the property within the city limits charged with each and every condition of the plat.

The judgment in the above case was modified in the case of *Tallon* v. *Hoboken*, 60 N. J. Law 212, 37 Atl. 895, decided by the Court of Appeals and Errors of New Jersey, without, however, affecting the principles laid down in the Supreme Court and here contended for. The fifth point of the syllabus in the case in the Court of Appeals and Errors reads:

> "A person who dedicates land to public use as a highway may, in such dedication, reserve to himself and his assigns the right to construct and operate a railroad therein. When such reservation is made, the public takes the highway *cum onere*."

In *Boston Water Power Co.* v. *City of Boston,* 194 Mass. 571, 80 N. E. 598, the city entered into a contract, quoted in the opinion, as follows:

> "We * * * in consideration of the immediate laying out and construction of said proposed street at the width of fifty feet * * * * and of any assessment that may be levied upon our several estates for the cost of said laying out and construction being delayed until the damages caused to us severally by the taking of said land and the cost of construction of said street, shall be determined, and of such damages being offset against the proportionate part of said cost which may be levied upon our respective estates, agree that the payment for said damages shall be delayed until the balance due from us, severally, after making said offset, has been determined."

The court says of this contract:

> "The validity of such a contract, if accepted and performed by a city, is not now in question. *Aspinwall* v. *Boston,* 191 Mass. 441, 78 N. E. 103; *Boston* v. *Simmons,* 9 Cush. 373; *Bell* v. *Boston,* 101 Mass. 506,"

and it was held that the city could not enforce the assessment until the damages caused by the taking of the land were determined and that the right existed in the property owners to have this offset against the assessment.

That the terms of a dedication are binding upon a city and that it is without the power of

the city to divert the property from a public use which the dedicator has fixed, is held in the case of *Board of Education of Kansas City* v. *Kansas City,* 62 Kans. 374, 63 Pac. 600. At page 603 the court says:

> "A dedication to such purpose of a particular portion of the general tract implies that no other portion of such general tract was intended for the one specific public purpose; hence the city authorities, in so far as they attempted to grant portions of Huron Place outside the particular tract designated as 'Seminary Place,' undertook that which they could not rightfully do, viz., to divert the doners' grant to uses other than those designed by them. 'After a complete dedication of lands to public uses has been made, neither the dedicator nor the municipal authorities may apply them to other uses. It is only by the assent of all those for whose benefit the dedication was made—that is, the local lot owners, whose private interests are affected, and the town authorities, as representatives of the public interests—that any change can be made.' 9 Am. & Eng. Enc. Law (2nd Ed.) 80."

At the time of the dedication in this case the property was in a different county. The court says:

> "Subsequently it became a part of Lawrenceville, which later became a part of the city of

Pittsburg. Therefore at the time these lots were laid out and the plan was made, Peebles township was not a part of the city, and the streets and alleys of the plan did not, by virtue of the act of 1836, become public highways. Under these circumstances, a city ordinance depriving a lot owner of his easement over the streets in the plan—a property right secured by contract—without compensation would offend *both the Federal and State Constitutions, and be void.*"

Holding that the city in the exercise of its power to vacate plats must so exercise the power as not to interfere with the contractural rights of the owners of the premises included within that plat and dedication, is the case of *Chambersburg Shoe Mfg. Co.* v. *Cumberland Valley R. Co.*, 240 Pa. St. 519, 87 Atl. 968. The syllabus thus states the law:

"Where streets are dedicated to public use by a platting and sale of lots in conformity with the plat, the municipality may accept or reject the easement thereby tendered or, having accepted, may renounce it by a vacating ordinance, but no act of the public authorities can divest the right of the purchasers to have the street remain open for the use of lot owners; their rights being dependent upon their contract with the vendor and not upon the acts of the municipal authorities."

The court says that the mere fact of a dedi-

cation does not impose an obligation upon the city to accept the streets, but once the streets are accepted and the highways are adopted as public highways of the city, then all the rights of the property owners within the plat become fixed even as against the city which has no power to impair the rights vested thereby.

As to what amounts to an acceptance of the plat and the terms, conditions and restrictions thereof by a city, the case of *Baker* v. *C. R. I. & P. R. R. Co.*, 154 Iowa 228, 134 N. W. 587, is an illustration of numerous and uncontradicted authorities holding that any act of the city dealing with the city as a public way, constitutes an acceptance of he plat and dedication, and, of course, an acceptance, as seen in the New Jersey case, must be *cum onere*. In the Iowa case just cited the third syllabus states the law:

> "The act of a city in authorizing a railroad to lay its tracks along a street either includes an acceptance of the street under a dedication by plat or is evidence of a prior acceptance." The court in the body of the opinion says:
>
> "That in granting the use of the street to these companies it recognized a previous acceptance thereof, or thereby accepted the dedication thereof, even though this may have been

> for the purpose of enabling it to furnish a passageway for the railroads through the city. This was no more than devoting it to an additional use as a street, and was utterly inconsistent with the contention that the strip of ground known as Samantha Street had not been, or at least was not, thereby accepted under the dedication tendered in filing the original plat. See *Burroughs* v. *City,* 134 Iowa, 429, 109 N. W. 876."

This subject is further dealt with in *Kimball* v. *City of Chicago,* 250 Ill. 105, 97 N. E. 257, where it is held that an ordinance of the city ordering the improvement on a street is an acceptance of the dedication. The fifth syllabus reads:

> "An acceptance of a dedication of land may be express, as by some positive act of a municipality evidenced by an ordinance or resolution, *or an acceptance may be implied from the acts of the city or the public* as by making improvements or by travel."

That the vendees and subsequent purchasers of lots is an addition cannot complain if the entire burden of this paving is placed upon them is shown by *Faller* v. *Town of Latonia* (Ky.), 24 Ky. L. Rep. 2476, 74 S. W. 287, the syllabus of which briefly states the law as follows:

> "The dedication of a street to public uses by one who plats an addition to a town is binding on his remote vendees."

To the same effect is *O'Donnell v. City of Pittsburg*, 234 Pa. 401, 83 Atl. 314, the reasoning contained in the following quotation from which is illuminative.

> "The owner of real estate, so long as he infringes no law, may do with it as he pleases; he has the right to dispose of it in any legal way which he may choose; he may sell it as a whole or in parts; he may lay it out in lots intersected by streets and alleys, and sell the lots with or without a grant to the purchasers and the public of an easement over the streets and alleys. If he lay the property out in lots, according to a plan disclosing such streets and alleys, and sells a lot, the law implies a grant or covenant on his part that all the streets and alleys on the plan shall remain open for the use of the public. The price paid for a lot is enhanced by the value of the easement in the streets and alleys appurtenant to the lot. The consideration is not only for the lot, but for the easement as well. The proprietor of the plan therefore cannot revoke the implied easement or dedication; nor can the owner of any lot or lots having purchased with a knowledge of the plan in accordance with which the lots were sold, obstruct or deny to the public the right to use any of the streets or alleys shown on the plan. The easement over the streets is appurtenant to every lot and becomes a property interest in the purchaser of the lot which must be protected by appropriate legal process."

And on page 260 the court adds:

"The record further shows that on two occasions—first in 1903 and again in 1910—the city recognized the legal existence of this alley by ordinances which were passed by the city council, one of which granted to one of the appellants the right to lay railroad tracks across the said strip to connect its property with the right of way of the railroad company. In *People* v. *Johnson*, 237, on page 241, 86 N. E. 677, it was said: 'An express acceptance may be shown by some order, resolution or action of the public authorities made and entered on record.' And in *Michigan Central Railroad Co.* v. *Bay City*, 129 Mich. 264, 88 N. W. 628: 'A resolution of the common council authorizing the construction of a railroad through land dedicated to the city as a street is effective as the acceptance by the city of an offer to dedicate.' To the same effect is the case of *Schaefer* v. *Selvage* (Ky.), 41 S. W. 269."

To the same effect see *Perratt* v. *Hamilton*, 134 Iowa 157, 111 N. W. 440; *Bloomfield* v. *Allen*, 146 Ky. 34; *Del., etc., R. Co.* v. *Syracuse*, 157 Fed. 709; *Spaulding* v. *Wesson* (Cal.), 45 Pac. 807.

Now it is admitted in the record in this case that the city after the dedication and filing of the plat in statutory form, extended the city limits and included the properties embraced within the plat in the city limits. Not only so, *but this very pro-*

ceeding is one in which the city exercised its power over these dedicated streets by ordering them paved; and under the authorities any such exercise of control over dedicated streets and ways by a municipality, is an acceptance of the dedication.

In the case of *City of Nobiesville* v. *Lake Erie & W. Ry. Co.*, 130 Ind. 1, 29 N. E. 484, the court says:

> "The occupancy of a highway by a railroad does not destrop its character. It remains a highway notwithstanding its use by the railway company. *Railway Co.* v. *Phillips*, 112 Ind. 59, 13 N. E. 132. * * * The use of the highway for a railroad is a public use and is not necessarily destructive of the character of the public way."

And the court in another portion of the opinion says:

> "After the acquisition of the easement, the dedication became irrevocable; for a valid dedication cannot be revoked."

The case of *Chicago* v. *Ward*, 169 Ill. 392, reported 38 L. R. A. 849, in a certain sense reverses the situation here. There was a dedication of a city park with restriction that no buildings should be erected upon it, this restriction being imposed

by the terms of the dedication, and it was held that it was without the power of the legislature against the consent of the abutting property owners, to grant the city the right to convey such land for railway purposes, as such action would be an impairment of the rights vested by the dedication, and that an abutting property owner could enjoin such railroad use and that his right to enjoin such use was not affected by the fact that the property in the neighborhood had ceased to be used for residence and had been converted to business uses, even though in the meantime the land had been submerged and had been reclaimed by the city.

The court quoted from *Jacksonville* v. *Jacksonville Ry. Co.*, 67 Ill. 540, 543, as follows:

> "A dedication must always be construed with reference to the object with which it was made. * * * The power of the legislature to repeal the charters of municipal corporations cannot be extended to the right to divert property given to the public for one use to a wholly different and inconsistent use. The power cannot exist to divert property from the purpose for which it was donated. This plat was a solemn dedication of the ground to the corporation, to be held in trust for the use of the public. The donation was made for a certain specific and defined purpose. * * * It

must be preserved or the land must revert to the original proprietors. The court cite as fully sustaining the view it has taken. *Cincinnati* v. *White,* 31 U. S., 6 Pet. 431, 8 L. Ed. 452; *Watertown* v. *Cowen,* 4 Paige 510, 27 Am. Dec. 80; *Le Clerq* v. *Galliopolis,* 7 Ohio, Pt. 1, p. 217, 28 Am. Dec. 641; *Carter* v. *Chicago,* 57 Ill. 283; *Price* v. *Thompson,* 48 Mo. 361; *Warren* v. *Lyons City,* 22 Iowa 351."

The Ward case, therefore, lays down the principle that rights obtained under a dedication are vested rights and are within the protection of the constitution. See, also, *Railroad Company* v. *Schermier,* 7 Wall. 272-289.

The court will remember that in this case it is admitted that the railway company paid the cost of curbing the sides of its right-of-way and of paving across its tracks where the cross street was paved, as provided in the dedication.

Under this state of facts the case of *A., T. & S. F. Ry. Co.* v. *Chanute,* 90 Kans. 428, 133 Pac. 576, becomes relevant. There the railway company had at its own expense, pursuant to authorization by the city, graded, guttered and paved the East Half of South Grand Avenue for a distance of one block adjoining plaintiff's right-of-way and station grounds. After this had been completed

the city proceeded to grade and pave the West Half of the street for such distance and assessed half of the cost of such paving of the West Half against plaintiff's right-of-way. The Railway Company asked and was granted an injunction restraining the enforcement of this assessessment and the City appealed. The court affirmed the judgment of the trial court, saying:

> "Obviously the trial court held it to be most inequitable and unjust for the city to attempt to charge the railway company with half the cost of the city's share of the improvement after the railway company under authority of the city had paid for improving their half of the street."

Now, in the instant case, the city actually recognized and adopted, as the plans and specifications show, this work of curbing and cross-paving done by the Railway Company, and the cost thereof was not attempted to be assessed against abutting property owners. By the dedications it is clearly contemplated that the performance of those burdens imposed by the dedications shall be the full equivalent and share of the Railway Company of the burden of paving, and it would be, as stated in the Chanute case, most inequitable for the City, in addition to this burden which the company

has assumed and performed, to charge the railway with a portion of the remainder of the cost of paving.

In this case neither the City nor the Paving Company is remediless. If an assessment has been eroneously made against the Railway Company, the abutting property owners are liable for it. No injustice is done to the abutting property owners by making them liable, because not only in point of fact, but under well considered authorities, the abutting owners acquire their property with the knowledge that when any paving is done, the Railway Company is only to do a certain definite, specific portion of it, and the rest of the burden is to fall upon him.

The point here just made is emphasized by this consideration: Suppose prior to the sale of a single lot by the dedicator, the streets are paved and the railway company performs to the amount of its obligation imposed upon it by the dedicator. It would not only be unjust as between the dedicator and the railway company to require the railway company to bear another and additional burden than that agreed upon between the two par-

ties, but it would violate the contract between the two.

In one of the above cited cases it is pointed out that the owner of the property is under no obligation to dedicate streets or highways; that when he does it he is exercising a power which is his and his alone. It is his property, to do with as he pleases. If he considers it to his benefit to contract with the railway company, in consideration of the enhanced value of his property by reason of the extension of a railway line into his property, that the railway company is to do only a certain portion of the paving, and that the abutting property is to bear the balance of the expense, so doing is his own affairs; and under State Statutes that contract was certainly within the power both of the dedicator and of the railway company to make.

It is doubtless superfluous to add in connection with the consideration of the effect of this dedication that it is to be construed as limiting the obligations of the railway company solely to the placing of curbs and the paving across the streets where streets are paved. Commencing with the

Sheldon case in the Supreme Court of the United States, and running on through the decisions which are hereinbefore quoted, including the Enid City Ry. case, cited *supra,* the principle is laid down that where a duty is imposed under a particular enumerated set of circumstances, that enumeration prevents the charge of a greater duty. Hence, where it is said that the Railway Company should curb its rights-of-way and pave across its tracks at street intersections, that is tantamount to saying that it shall not be required to do any other thing respecting paving, and that no other duty respecting paving, can be imposed upon the railway company. It would be impertinent to repeat in this connection all of the authorities hereinbefore cited confirming this principle of law.

At the time this property was dedicated it was not subject to the government of the City of Oklahoma City, and was not within its limits. The contract which was made was a contract which the dedication statute of the State of Oklahoma *empowered both parties to make,* one to grant upon the conditions named, ad the other to take the grant upon the conditions named; and when the city included this property within its corporate

limits it took it in the condition in which it then was and subject to the contract rights then vested; and when it ordered the improvement of these streets it ordered them charged with notice (and in this case notice was actually brought home, as the evidence shows (Tr. pp. 71-2; pp. 76-77), both to the city and to the paving company) that the other parties had a contract and that the city was without power to levy an assessment upon the railway company, because so doing would impair the obligations of its franchise and of such dedications, and deprive it of its rights thereunder without due process of law, notwithstanding which, and being in possession of a clear, plain and adequate method of paying for this paving under the law by an assessment against the abutting owners, the city and the paving company proceeded, nevertheless, in a manner which the paving company itself prescribed and adopted, and whic hit has repudiated, by bringing this action, as being illegal and insufficient, in their attempt to burden the railway company. The enforcement of this pretended lien by a foreclosure upon the specific property, will put the railway company, as the evidence shows (Tr. p. 70) in a condition where it will simply have to abandon

these lines and let them go under foreclosure of the statutory lien.

And all of these consequences follow in a case in which the court refused even to hear and consider proffered evidence which showed that the assessment which was made and which was attempted by mandamus of the court to be imposed, was confiscatory, conferred no benefits upon the property, and violated every principle of justice and fairness.

It is difficult to conceive a case where more reason exists for declaring this enforced charge unwarranted and violative of the rights of the parties.

THIRD.

The Supreme Court of the State of Oklahoma erred in upholding the ruling of the District Court of Oklahoma County refusing to permit the Oklahoma Railway Company to introduce evidence showing that the paving of Linwood Boulevard, conferred no benefit whatever upon the private right-of-way in question and that in view of the physical form, extent and location of such private right-of-way, it was susceptible of no benefit whatsoever consequent upon such paving; and the said Supreme Court of the State of Oklahoma erred in refusing to hold and adjudge that the imposition of any lien upon the said private right-of-way for and on account of such paving and the charging of such private right-of-way with a lien for any portion of the cost of such paving, would deprive the Oklahoma Railway Company of its property without due process of law in violation of that portion of the 14th Amendment to the Constitution of the United States providing that no state shall deprive any person of property without due process of law, the protection of which amendment the Oklahoma Railway duly claimed.

The foregoing proposition presents the claim to the protection of the 14th Amendment made by the Railway Company with relation to its franchise contract and its dedication contract, as well as the claim that the affirmance of the judgment of the District Court denied it an opportunity to be heard upon the amount or absence of benefits resulting to its right-of-way from the improvements in question, and as well, also, its claim made under the al-

legations and proof offered in support thereof, that since it had no property in the vicinity of the improvement susceptible of benfits, therefore such judgment, in determining its right-of-way liable in any erspect to assessment, deprived it of its property without due process. If rights were vested in the Railway Company either by the franchise or the dedication, or by both, as hereinbefore contended, the action of the court in the mandamus proceeding has the effect of depriving it of its property without due process of law, in addition to impairing the obligations of these contracts.

In view of the preceding discussion, it is unnecessary to consider further the question as to whether rights protected by the 14th Amendment were vested in by the franchise and the dedication. There is, therefore, left for consideration the question whether the effect of the decree of the District Court which was affirmed, without modification, is to deprive the Railway Company of its property without due process of law, in the above respects.

Of the general question here involved the court below says:

"The questions involved are: (1) Whether

mandamus will lie, and (2) whether the private right-of-way of the Railway Company is subject to assessment to pay the cost of paving said Boulevard." (Tr. p. 136.)

As to the question as to whether mandamus would lie, the court says:

> "It is urged that the writ was erroneously issued because it deprives the railway company of the right to be heard, in violation of Federal and State Constitutions, and because it attempts to control discretion." (Tr. p. 136.)

After pointing out that under the statute, when the written report of appraisers is filed with the City Clerk, the Mayor and Council are required to give notice of, and hold, a hearing of any complaints that may be made concerning the assessment and apportionment, and that under the section relating to re-assessment it is required that the same shall be done in the manner provided for levying an original assessment, the Court says:

> "Thus it will be seen that when the commissioners proceed in obedience to the decree of the court to re-assess the property of the railway company an opportunity will be given the company to be heard and to complain or object to the amount of the assessment." (Tr. p. 136.)

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In this connection the court adds:

"The lower court found that all of the proceedings, resolutions and actions of the mayor cand city council up to and including the ordinance levying the assessment were regular and in accordance with law in all respects, except that the property of the railway company was not described with sufficient accuracy to sustain the assessment against the company. In appointing the appraisers and in describing the property subject to assessment no discretion is vested in the municipal authorities, therefore the writ in directing the authorities to re-assess the property by proper description does not seek to control any discretion. The writ does not seek to control as to the amount of the assessment, but only as to the description of the property" (Tr. pp. 136-137).

That the State Supreme Court in making these quoted statements, entirely misread and failed to appreciate the effect of its judgment is shown by reading the judgment which was affirmed without modification (copied hereinbefore, p. 28), in which the assessing authorities of the city were unequivocallly precluded from affording the Railway Company an opportunity to be heard as to the amount of assessment, and in which the writ expressly controls the amount to be assessed.

In this connection, the statutes dealing with assessments for benefits resulting from paving or

otherwise improving the street are pertinent. It should be stated that the provisions of the Oklahoma law upon this subject are different from those which this court has frequently had to construe; as for example, those in which the legislature has definitely fixed the boundaries of the paving district, and has by legislative declaration determined that property within such boundaries is benefited, and that such benefits are to be apportioned upon the basis, for example, of area or frontage. Under such statutes it has been held that the legislative determination of benefits according to the statutory method of apportionment is conclusive, except where such statutory rule is arbitrary or palpably unjust and confiscatory.

The statutes which are here pertinent are found in Article XII, Chapter 10, Rev. L. of Oklahoma 1910, ss. 608-644.

Section 619, referring to the property chargeable with the cost of the improvement, says:

> "The lots, pieces or parcels of land fronting and abutting upon any improvement for which the property is chargeable shall be charged with the cost thereof to the center of the block where the abutting way is on the exterior of

the block, and to the exterior of the block where the improvement is made of an alley or other public way in the interior of such block; and each quarter-block shall be charged with its due proportion of the cost of so improving both the front and the side streets on which said block abuts, together with the areas formed by street intersections and alley crossings (except such portion of such street intersections and alley crossings as may be chargeable under the provisions of this article to street and steam railways), which cost shall be apportioned among the lots and subdivisions of such quarter block according to the ownership thereof as the same appears of record in the county, *and according to the benefits to be assessed to each lot or parcel, as hereinafter provided* * * * when triangular or other irregularly shaped lots or tracts are to be assessed for any such improvements, any part of the cost of such improvement *in excess of the benefits* accruing to such lots or tracts *shall be borne* by the city."

Section 621 provides:

"If any of the property abutting upon such improvement shall not be platted into lots and blocks, the mayor and council *shall include such property in proper quarter-block districts for the purpose of assessment and appraisement*, as provided herein, based upon the division of such property into blocks three hundred feet deep, measured from the outer boundary of the abutting street: Provided, that if the property on the opposite side of such street is so platted, such unplatted property shall be platted to

conform thereto as nearly as practicable, and that if the property on the opposite side of the street is not platted, then such unplatted property shall be divided into quarter-block districts based on blocks which shall be uniform as nearly as practicable, with blocks already platted, if any, on the same street."

Section 626 provides:

"As soon as the contract is let, and the cost of such improvement, which shall also include all other expenses incurred by the city incident to said improvement in addition to the contract price for the work and materials, is ascertained by the city, the mayor and council shall, by resolution, appoint a board of appraisers to appraise and apportion the benefits to the several lots and tracts of land, *which shall be designated in said resolution.*"

Section 627 provides:

"It shall be the duty of said appraisers, within five days after being notified of their appointment, to proceed to appraise and apportion the benefits *to such lots and tracts of land as shall have been designated by the council;* according to the title as aforesaid, after having taken and subscribed an oath to make a true and impartial appraisement and apportionment. A written report of such appraisement and apportionment shall be returned and filed. * * *"

Section 629 provides:

"The mayor and council at said session shall have the power to *review and correct said ap-*

> *praisement and apportionment, and to raise or lower the same as to any lots or tracts of land, as they shall deem just*, and shall, by resolution confirm the same as so revised and corrected by them.".

From the foregoing provisions it clearly appears that the duty rests with the city commissioners to determine upon and describe the property as against which assessments shall be levied; that as respects irregular tracts, any cost of improvement in excess of benefits accuring thereto is to be paid by the city; that when the city commissioners appoint appraisers they are required to designate and describe the property subject to assessment by some proper description; that the city commissioners, after the filing of the report of the appraisers, are required to give notice of hearing upon such report, at which any person is clearly given, as the State Supreme Court recognizes, the right to be heard. *The assessment is by contemplation of the statutes to be in accordance with the benefits and not in accordance with any fixed rule of apportionment.* In this respect the statute is formulated in harmony with the Constution of Oklahoma, Section VII, Article X, which provides:

> "The legislature may authorize county and municipal corporations to levy and collect as-

sessments for local improvements *upon property benefited thereby,* homesteads included, without regard to a cash valuation."

The court will bear in mind the fact that the original assessment proceedings are declared to be invalid and void insofar as the Oklahoma Railway Company and its property are concerned. It, therefore, must be concluded that the Railway Company has never had an opportunity to be heard on the question of benefits. This is true, because void proceedings can never have the effect of charging one with notice of anything occurring thereunder. The Railway Company has then never been accorded the right, which the statutes recognize as belonging to it in due course of law, to be heard in any valid proceedings, to object or protest as to the assessment of benefits against it. In fact this is tacitly recognized in the opinion of the State Supreme Court wherein it is said:

> "Thus it will be seen that when the commissioners proceed in obedience to the decree of the court to re-assess the property of the Railway Company an opportunity will be given the Company to be heard and to complain or object to the amount of the assessment."

It was complained in the State Supreme Court that the mandamus order of the District Court con-

trolled the discretion of the city commissioners in making this re-assment in two particulars: First, in the determination that the Railway Company's private right-of-way should be included in the improvement districts; and, second, in the determination that there should be assessed against the property of the Railway Company a definite fixed sum with interest from the date of the attempted original, but void, assessment. It will be remembered that the witness Shartel described this long, narrow strip of land situated between the double drive-way of the street and testified that it had no commercial value for any other purpose than a street railway right-of-way, although it might possibly be of value in any subsequent widening of the street or in beautifying the city. His proffered testimony was that the land was never at any time worth more than $800.00 per acre for any purpose; that prior to the making of the improvement it was worth approximately $500.00 per acre; that after the improvement it was worth $300.00 per acre; that the laying of the paving at the side of the right-of-way had decreased its value for the only commercial use of which it was susceptible and to which, under the dedication, it could be put. A mathematical calculation based on the plat will show that under this evidence the

value of this entire private right-of-way tract was never in excess of $2,850.00; that before the improvement its value was $1,800.00, and that after the improvement its value was $1,080.00. The principal of the amount ordered to be assessed against it was to exceed $12,000.00 or eleven times its value after the improvement was made. This was the only testimony offered upon the subject, and was offered by one who had qualified as being familiar with values in this vicinity, and for the purpose of this discussion must be taken as true. A calculation based upon areas included in the assessment district, and upon the total assessments, as indicated by the plat, shows that while the right-of-way lying between the double driveways of Linwood Boulevard is slightly less than one-ninth of the total area, it is ordered to be assessed more than one-fifth of the entire cost of the improvement.

It is true, as above pointed out, that the Supreme Court recognized the right of the Railway Company to be heard in the event of the re-assessment, but clearly the decree of the State Supreme Court is to be tested *by what it does, not by what the opinion says.*

The thing it does it to affirm the judgment of

the District Court without modification. That judgment required the assessment of twelve thousand odd dollars with interest. It did not even permit the city commissioners, sitting as a reviewing and assessing board, to hear the Railway Company upon the subject of benefits, or to reduce the assessment to conform to its own ideas of benefits.

So that there may be no doubt as to the effect of this judgment of the District Court the pertinent portion thereof is again quoted. The city commissioners are required:

> "To re-assess against the said private right of way of the Oklahoma Railway Company by a proper description the said sum of $12,046.16, together with interest thereon from December 11, 1911, at the rate of seven per cent per annum, payable in installments as provided by the said ordinance numbered 1598, and that they take such steps as may be necessary to properly re-assess said property of the said defendant, the Oklahoma Railway Company (Tr. p. 130).

It is submitted that the judgment in the court below in view of the foregoing considerations, under rules heretofore announced in this court, deprives

the Railway Company of its property without due process of law.

In the case of *Wagner* v. *Baltimore*, 239 U. S. 208, which was one dealing with special assessments, the court said, at page 220:

> "The constitutional protection against deprivation of property without due process of law would certainly be available to persons arbitrarily deprived of their private rights by such state action, whether under the guise of legislative authority or otherwise."

From this statement it appears that for the purpose of the present discussion it is immaterial whether the making of this assessment be deemed the result of the action of the court or of the legislative body of the city.

The instant case, however, differs from that of *Wagner* v. *Baltimore* in that whereas in the Wagner case the court said:

> "But in the present case there is neither allegation nor proof of such disproportion between the assessment made and the benefit conferred as to suggest that the small tax levied upon this property would amount to an arbitrary exercise of the legislative power upon the subject,"

in the instant case, on the face of the record, there

is both allegation and proof, offered, but refused, of such disproportion of the assessment made and the benefits conferred, and, in view of the fact of the entire absence of benefits, as well as the disclosure by the record of gross inequalities in the amounts to be assessed against the Railway Company as compared to that to be assessed against against ordinary abutters, as to show a settled determination to discriminate against the Railway Company, and to suggest that the amount of the assessment aaginst the Company would amount to an arbitrary exercise of the legislative power upon the subject.

The principle laid down in the case of *Houck* v. *Little River Drainage District*, 239 U. S. 254 (l. c. 265) is not disputed.

> "The state in its discretion may lay such assessments in proportion to position, frontage, area, market value, or to benefits estimated by commissioners. *Davidson* v. *New Orleans*, 96 U. S. 97, 106; *Walston* v. *Nevin*, 128 U. S. 578, 582; *Spencer* v. *Merchant, supra; Bauman* v. *Ross, supra; French* v. *Barber Asphalt Paving Co. supra; Wright* v. *Davidson, supra.*"

But it is claimed that this is not done by the statutes of Oklahoma. While the relation of front-

age and abutment upon the improvement is made one of the requisites to liability for an assessment, yet the ultimate determining factor is the legality of an assessment *is whether the property is benefited.* Under the manifest contemplation of the statutes, the assessment may not arbitrarily exceed the benefits, and certainly cannot exceed the benefits estimated by the commissioners, who are chargd with the duty of determining the question as to the amount of benefits.

The complaint against the action of the State Supreme Court and the State District Court is that the city commissioners charged with the statutory duty and authority of determining benefits are by the arbitrary action of the court in making its mandatory order, deprived of the authority of even considering evidence upon the subject; that the court in making this order refused to hear the evidence that was offered; that the evidence offered conclusively showed that property received and that it can receive, no benefits from the improvement; and that the assessment is so disproportionate as to amount to an arbitrary and confiscatory act, taking the property of the Railway Company while denying it an opportunity to be heard. The

case is therefore within the implication of the immediately succeeding language of the court in the case of *Houck* v. *Little River District*, reading:

> "And, as we have said, unless the exaction is a flagrant abuse, and by reason of its arbitrary character is mere confiscation of particular property, it cannot be maintained that the State has exceeded its taxing power."

The same principle is laid down in the case of *Myles Salt Co.* v. *Iberia Drainage Dist.*, 239 U. S. 478, the facts in which, by way of analogy, bear such resemblance to the case at bar as to make the principles there announced applicable here. The court, in response to the claim that under the state statutes fraud in the action of the legislative body must be expressly plead, said:

> "We cannot concur in the contention. It is true the law of the state as written is not attacked, but the law as administered and justified by the Supreme Court of the State is attacked and it is asserted to be a violation of the Constitution of the United States. The question presented is Federal, and the motion to dismiss is denied. And the considerations that move a denial of the motion move a decision of the merits of the question.
>
> "The charge is that plaintiff's property was included in the district not in the exercise of

"legal legislative discretion,' not that the scheme of drainage would inure to the benefit of the property, even indirectly, but with the predetermined 'purpose of deriving revenues to the end of granting a special benefit to the other lands subject to be improved by drainage, without any benefit' to plaintiff 'or its property wherever,' present or prospective.

"Nothing could be more arbitrary if drainage alone be regarded. But there may be other purposes, defendants say, and, besides, that the benefit to the property need not be direct or immediate; it may be indirect, such as might accrue by reason of the general benefits derived by the surrounding territory. But such benefit is excluded by the averments, and it certainly cannot be said that the elevated land of Weeks Island could be a receptacle for stagnant water or would be otherwise a menace to health if not included within the district or would defeat the purpose of the law, which seems to have been the ground of decision in *George* v. *Sheriff*, 45 La. An. 1232. The case, therefore, is within the limitation of the power of the State as laid down in *Houck* v. *Little River Drainage District*, *ante*, p. 254, which cites *Norwood* v. *Baker*, 172 U. S. 269, and retains its principle. It has not the features which determined *French* v. *Barber Asphalt Paving Company*, 181 U. S. 324, and the case which has followed that case, and *Wagner* v. *Baltimore*, *ante*, p. 207, decided coincidently with *Houck* v. *Drainage District*, and cited in the latter.

"It is to be remembered that the drainage district has the special purpose of the im-

provement of particular property and when it is so formed to include property which is not and cannot be benefited directly or indirectly, including it only that it may pay for the benefit to other property, there is an abuse of power and an act of confiscation. *Wagner* v. *Baltimore, ante*, p. 207. We are not dealing with motives alone but as well with their resultant action; we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations not of the improvement to plaintiff's property, but solely of the improvement of the property of others—power, therefore, arbitrarily exerted, imposing a burden without a compensating advantage of any kind."

The Oklahoma statute requires, and the Supreme Court in its opinion recognizes, that the reassessment must be made "in the manner provided for levying an original assessment" and with like proceedings; and that the making of an original assessment, under the staute, affords due process of law, and an opportunity to be heard when the city commissioners, after notice given, sits as a reviewing board to determine the amount that it shall assess against a particular piece of ground.

This statutory requirement was obviously inserted in order that the statute of itself might afford that due process of law guaranteed by the

14th Amendment. But it as practically administered, the decision of the court below in terms precludes giving effect to this statutory provision of due process.

In the case of *Embree* v. *Kansas City Road Dist.*, 240 U. S. 242, the legislature had not definitely fixed the boundaries of the improvement district, but had left the matter of determining what property should be included therein rest upon whether benefits would accure to the particular property from the improvement.

The court said:

> "As the district was not established by the legislature but by an exercise of delegated authority, there was no legislative decision that its location, boundaries and needs were such that the lands therein would be benefited by its creation and what it was intended to accomplish, and, this being so, *it was essential to* due process of law that the land owners be accorded an opportunity to be heard upon the question whether their lands would be thus benefited. If the statute provided for such a hearing, the decision of the designated tribunal would be sufficient, unless made fraudulently or in bad faith. *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, U. S. 112, 167, 174-175."

The court further said:

> "True, the statute does not in terms say that lands which will not be benefited shall be excluded or that only such as will be benefited shall be included, but it does say that the court shall make such change in the proposed boundaries 'as the public good may require.' In the presence of this comprehensive direction there can be no doubt that the legislature intended to authorize and require the county court to adjust the boundaries so they would include only such lands as might be reasonably expected to be benefited by the improvement of the district roads and therefore might be properly charged with the cost of that work. That there is an inseparable union between the public good and due regard for private rights should not be forgotten."

The phrase "as the public good may require" in the Missouri statute referred to in the foregoing quotation has its analogy in the Oklahoma statute in Section 619 above quoted, where it is provided that the cost of the improvement shall be apportioned among the lots and subdivisions according to ownership "*and according to the benefits to be assessed to each lot or parcel* as hereinafter provided;" and further has its analogy in Section 626, Rev. L. Oklahoma 1910, in which the appraisers are to be appointed "*to appraise and apportion the benefits to the several lots and parcels of land*

which shall be designated in accordance to the record litle thereof;" and further has its analogy in the provisions of Section 629, Rev. L. of Oklahoma 1910, in which the "report of the appraisers is to be reviewed and corrected and raised, or lowered, as to any lots or tracts of land as they (the city commissioners) shall deem just."

In the Embree case it was held that because a hearing was held at the time of the enforcement of the assessment due process was afforded. Under the Oklahoma statute, however, no such opportunity is afforded upon the attempt to enforce the assessment. The only opportunity to be heard before the city authorities is at the time they review and correct the report of the appraisers "as may be deemed just," at which time the actual levy of assessment is to be made.

There can be no question but that under the decisions of this court in numerous cases, the right to be heard at some point in the proceedings as to what portion of the tax will be assessed upon the property is guaranteed by the 14th Amendment; at least under those statutes where the area or frontage method of apportionment is not conclusively determined by the legislative authority. In very

numerous opinions the United States Supreme Court has treated this question. The principles deducible therefrom are that the legislature can authoritatively declare that lands bearing a certain relationship to the improvement are benefited, and that the benefits to such lands shall be apportioned and assessed either according to frontage or to area; and that such method of apportionment will not be disturbed by the court under a claim to the protection of the 14th Amendment, except in those particular cases in which the enforcement of the statutory rule results in plain abuse of authority, and such gross inequality as to be palpably unjust; *Gast Realty & Investment Company* v. *Schneider Granite Company*, 240 U. S. 55; *Linder* v. *Land*, 210 U. S. 373; *French* v. *Barber Asphalt Co.*, 181 U. S. 324; but that where the assessments are made according to special benefits it is necessary that at some stage of the proceedings an opportunity to be heard be afforded.

These principles are summarized in the opinion of the court in the case of *St. Louis & Kansas City Land Company* v. *Kansas City*, 241 U. S. 419, 60 L. Ed. 1072, where it is said:

"It is true that all taxes and assessments are

laid by some rule of apportionment. Where the scheme of distribution is palpably arbitrary and constitutes a plain abuse, it may be condemned as violative of the fundamental conceptions of justice embodied in the 14th Amendment. The principles involved in such cases have recently been discussed and need not be restated. *Wagner* v. *Leser*, 239 U. S. 207, *ante*, 230, 36 Sup. Ct. Rep. 66; *Houck* v. *Little River Drainage Dist.*, 239 U. S. 254, 265, *ante*, 266, 274, 36 Sup. Ct. Rep. 58; *Myles Salt Co.* v. *Iberia & St. M. Drainage Dist.*, 239 U. U. 478, 485, *ante*, 392, 396, 36 Supt. Ct. Rep. 204; *Gast Realty & Invest. Co.* v. *Schnieder Granite Co.*, 240 U. S. 55, 58, 59, *ante*, 523, 525, 36 Sup. Ct. Rep. 254; *Embree* v. *Kansas City & L. B. Road Dist.*, 240 U. S. 242, 250, 251, *ante*, 624, 628, 629, 36 Sup. Ct. Rep. 317. But the mere fact that there may be inequalities is not enough to invalidate state action. *Davidson* v. *New Orleans*, 96 U. S. 97, 105, 24 L. Ed. 616, 620; *Walston* v. *Nevin*, 128 U. S. 578, 582, 32 L. Ed. 544, 546, 9 Sup. Ct. Rep. 192; *Fallbrook Irrig. Dist.* v. *Bradley*, 164 U. S. 112, 176, 177, 41 L. Ed. 369, 394, 17 Sup. Ct. Rep. 56; *Houck* v. *Little River Drainage Dist.*, 239 U. S. 478, 485, *ante*, 392, 396, 36 Sup. Ct. Rep. 58. *Where assessments are made by a political subdivision, a taxing board, or court, according to special benefits, the property owner is entitled to be heard as to the amount of his assessment, and upon all questions properly entering into that determination.* 'If the legislature,' as has frequently been stated, 'provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be as-

sessed upon his land, there is no taking of this property without due process of law.' *Spencer* v. *Merchant*, 125 U. S. 345, 355, 356, 31 L. Ed. 763, 767, 768, Sup. Ct. Rep. 921; *Paulsen* v. *Portland*, 149 U. S. 30, 41, 37 L. Ed. 637, 641, 13 Sup. Ct. Rep. 750; *Bauman* v. *Ross*, 167 U. S. 548, 590, 42 L. Ed. 270, 288, 17 Sup. Ct. Rep. 966; *Goodrich* v. *Detroit*, 184 U. S. 432, 437, 438, 46 L. Ed. 627, 630, 631, 22 Sup. Ct. Rep. 397. What is meant by his 'proportion of tax' is the amount which he should be required to pay, or with which his land should be charged. As was said in *Fallbrook Irrig. Dist.* v. *Bradley*, 164 U. S. p. 175, 41 L. Ed. 394, 17 Sup. Ct. Rep. 56, when it is found that the land of an owner has been duly included within a benefit district, 'the right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, *i. e.*, the amount of the tax which he is to pay. See, also, *French* v. *Barber Asphalt Paving* Co., 181 U. S. 324, 341, 45 L. Ed. 879, 888, 21 Sup. Ct. Rep. 625."

It is readily to be seen that the position of the Railway Company is somewhat broader than the mere argument that because the court by its mandamus order fixed the amount to be assessed it had, therefore, deprived the Railway Company of the right to be heard as guaranteed by the 14th Amendment. Since the issue was raised in the courts below as to the liability of the Railway Company for the assessment; and since the reason for making the Railway Company a party to the action

was obviously to bind it by the judicial determination of the fact of its liability; and in view of the fact that the Railway Company raised the issue as to its liability, in any event, under its allegation that its private right-of-way could under no circumstances be benefited by the improvement, it urges that the making of any order adjudging that the Railway Company is subject to any liability on account of paving deprived it of its property in violation of the 14th Amendment. If it is correct in its contention that the statutes require property to be benefited before it can be assessed, under its proffered showing of the entire absence of benefit, it is entitled to have the judgment of the court that no re-assessment whatever should be levied against it. The principles above discussed and laid down in the decisions of this court undoubtedly sustain this view.

It would serve no useful purpose to multiply quotations or citations. The matter has been so frequently before this court that the doubts heretofore existing as to the underlying rules of law applicable under varying states of fact have been fully discussed and settled.

The facts of the present case are clearly within that rule which requires, for due process, an opportunity to be heard, which the record shows to have been denied the Railway Company. The question was fairly and fully presented to the court below, which recognized the right, but which by its affirmance of the decree denied the recognized right.

The cause is respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 195.

OKLAHOMA RAILWAY COMPANY,
Plaintiff in Error,
vs.
SEVERIN PAVING COMPANY
and
THE CITY OF OKLAHOMA CITY,
Defendants in Error.

BRIEF IN BEHALF OF DEFENDANTS IN ERROR.

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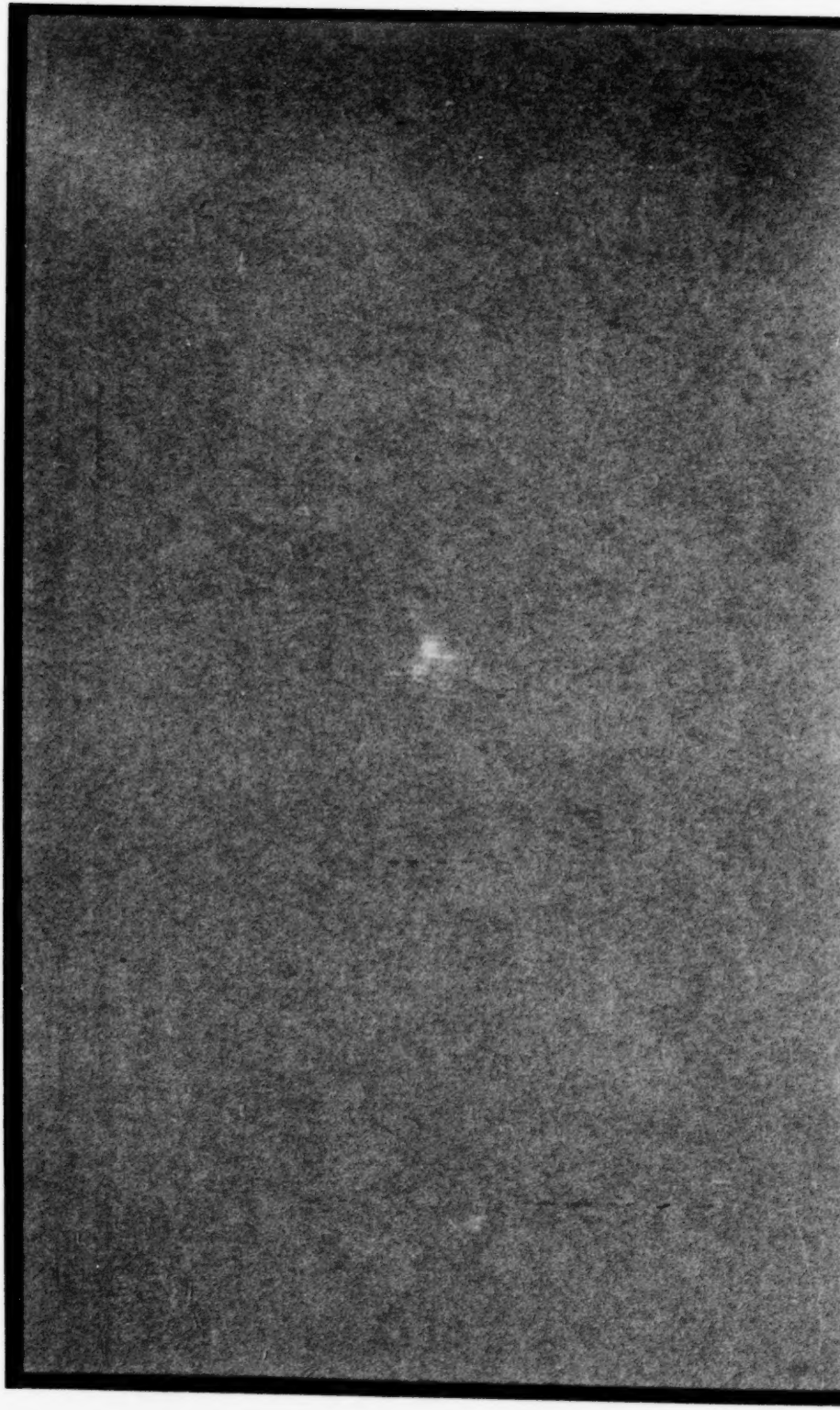

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In the Supreme Court of the United States

OCTOBER TERM, 1919.

No. 106.

OKLAHOMA RAILWAY COMPANY,
Plaintiff in Error,

vs.

SEVERNS PAVING COMPANY
and
THE CITY OF OKLAHOMA CITY,
Defendants in Error.

BRIEF IN BEHALF OF DEFENDANTS IN ERROR.

I.

The terms and provisions of Ordinance No. 281 *have no application to lots or land owned by the Railway Company and abutting on a street to be paved, or to the assessment thereof for paving purposes under the general law; but said ordinance applies solely to the Railway Company's obligation with respect to the paving of those streets of the city occupied by it.*

The dedication to the Railway Company of the lands subjected to the paving assessment was made on November 29, 1909 (Printed Tr. 53). It was alleged in the Railway Company's answer or return to the alternative writ of mandamus in the trial court that all of said lands so dedicated, and a larger tract of which said dedicated lands were a portion, were owned by the Linwood Place Development Company, and that they were undeveloped and uninhabited lands situated either adjacent to or some distance removed from the City of Oklahoma City, but not then within the corporate limits of said city (Printed Tr. 47). It was further alleged in said answer or return that said tract of land of which the dedicated land is a portion was brought into and made a part of Oklahoma City after said dedication and conveyance was made, delivered and recorded as provided by law. (Printed Tr. 49).

The dedication conveyed to the Railway Company a strip of land 40 feet wide through a portion of the tract, and 33 feet wide through the remainder; and those strips were bounded on each side by a highway 20 feet wide. The dedication was made "with a like effect as though deeded and conveyed to said company in fee simple by separate deed." The Supreme Court of Oklahoma held in this case that the Railway Company thereby acquired and ever since has had a title in fee simple to the dedicated tract as fully and completely as if the conveyance had been by warranty deed; and plaintiffs in error do not question the correctness of that holding. Moreover that is not a fed-

eral question. But see *Georgia* v. *Trustees of Cincinnati S. Ry.* 248 U. S. 26.

This strip, therefore, 40 feet wide, being the absolute property of the Railway Company in fee simple, from which it had the right to exclude all pedestrians, horses and vehicles, was not a street, avenue or alley of the city, even after the platted tract was brought within the city limits. It did not belong to the public. It never became a highway of the State before the tract was annexed to the city, or a street, avenue or alley of the city thereafter. It was never dedicated or conveyed to the public. On the contrary, it was specifically excepted and reserved from the dedication made to the public, and was specifically granted in fee simple to the Railway Company.

Now admitting for the purpose of the argument that ordinance No. 281, granting to the Railway Company, its successors and assigns, a street railway franchise in Oklahoma City is a contract, and as such is inviolable, the terms and provisions of that contract must nevertheless be considered and construed in relation to its subject matter and in the light of the object intended to be accomplished by it, and the lawful intention of the parties thus arrived at must be given effect.

What was the relation of the parties to the subject matter, and what was intended to be accomplished by the granting of the franchise? The City of Oklahoma City either owned in its proprietary capacity, or controlled in its governmental capacity, the streets and alleys of the city. The Railway Company de-

sired to build and operate a street railway thereon. In order to do this, it was necessary to procure the consent of the city to the construction of its tracks, poles and wires upon, and the running of its cars over, the streets and alleys of the city; and the whole object and purpose of the parties was to procure on the one hand and to grant on the other the consent of the city to the use of its streets and alleys for that purpose. In its essential features a franchise of this character is nothing more. It is merely a governmental grant of a right or privilege to a person to do a thing, which, but for the grant, he would have no power to do. The Railway Company would have needed no franchise to build its tracks upon and run its cars over land which it owned. The subject matter of the purported contract was the consent of the city to the construction and operation of a system of electric street railroads in and over the streets, avenues and alleys of the City of Oklahoma City. If the Railway Company had already possessed that right, it would have needed no franchise, and would have applied for none. The procuring of that right or privilege was the subject matter of the purported contract. And the relation of the parties to the contract was that of a dispenser of the privilege on the one hand and an applicant for it on the other.

Thus, in the first section of Ordinance No. 281, there is granted to the railway company the right "to establish, construct and maintain *in the streets, avenues and alleys of the City of Oklahoma City*, as now existing or hereafter extended, a system of electric street railroads, consisting of either double or single tracks,"

and also the right to maintain "overhead trolley systems suspended on posts placed along the curb line, or in the center of such street or streets where necessary."

Section 2 provides the distance above the surface of the streets at which the wires suspended from the trolley poles shall be placed, and provides that they shall be so placed as to afford the least interference with the free and unrestricted use of the streets by the public.

Section 4 relating to paving, which the plaintiff in error contends is a contract exemption from paving assessments, provides as follows:

> "Wherever the line of the railway company's tracks *traverse any street* upon which the pavement is constructed, it shall be the duty of said company after laying its tracks, to restore such pavement wherever injured or destroyed, taken up or removed, to its previous condition. And whereever the said City of Oklahoma City shall hereafter pave or re-pave any *street upon which said line of railway is constructed*, it shall be the duty of the said railway company to construct or pay the cost of construction of a total width in area along the *streets so occupied* of six and two-thirds feet for each track *occupying such street* according to specifications adopted by said council. And to maintain such pavement in good condition during the time *such tracks may remain in such streets*, except when the duty of the maintenance of said pavement may rest upon any contractor constructing such pavement."

It is thus seen that the right granted to the Railway Company by this franchise was, not to con-

struct and operate a railroad line upon a strip of land forty feet wide which the Railway Company itself owned in fee, and to do which the Railway Company would not need the consent of the city, but it was to use the streets and alleys belonging to the city, over which the city had control, and without whose consent the Railway Company could not occupy them.

It is also to be seen that Section 4 of the ordinance relating to paving purports to give to the Railway Company no exemption whatsoever from any of the duties or obligations which devolve upon the owners of land in the city, but it purports merely to prescribe what the duty of the Railway Company shall be with respect to the pavement of streets upon which said line of street railway is constructed.

Where it is contended that an exemption from taxation has been granted by contract, the exemption, if any be found to exist, will not be extended by construction, but will be confined, to that which is clearly within the terms of the contract.

Charles River Bridge v. *Warren Bridge*, 11 Pet. 420.
Citizens Bank v. *Parker*, 192 U. S. 73, 87.
Phoenix Ins. Co. v. *Tennessee*, 161 U. S. 174, 177.
Schurz v. *Cook*, 148 U. S. 397, 409.
Illinois Central R. Co. v. *Decatur*, 147 U. S. 190.

It is contended that Section 4 of the ordinance prescribes the sole and exclusive obligation of the

Railway Company as to paving. It may be admitted that said section does provide the sole and only obligation of the Railway Company in respect of the paving of those streets to which Section 4 refers, namely, streets "upon which said line of railway is constructed," "streets so occupied," streets in which "such tracks may remain;" and as to the pavement of those streets, upon which the railway company is not an abutting property owner, but which it merely occupies by consent of the city, the measure of its duty is fixed by the contract. It may be said that it agrees to do so much paving on those streets as a consideration for the use of those streets. But the contract goes no further, and does not profess to do so. As to the pavement of streets which the Railway Company does not occupy, but upon which property owned by it in fee simple abuts, the contract is absolutely silent. It contains no exemption. It does not refer to the pavement of such streets, or the Railway Company's obligation as to its property abutting thereon at all or in any manner. In the first place, the parties were not contracting with reference to such streets. In the second place, the city could not have granted the Railway Company as an abutting property owner such exemption; for the city's powers in that respect were prescribed by the Act of the Territorial Legislature approved March 5, 1901, sections 443 to 453, inclusive, of Revised and Annotated Statutes of Oklahoma, 1903. Section 445 thereof provides that "the abutting lots, pieces or parcels of ground shall be charged with the cost of making any improvements herein specified * * *." Given the fact that the Railway Company owned property in fee abutting upon

the street to be paved, that property was liable to assessment just as any other property so abutting, whether a portion of it was or was to be used as a right of way, a depot, an office building, or for any other purpose; and in such case the city would have had as much right to exempt any individual lot owner from assessment as it would have had to exempt the Railway Company.

As to those streets which the Railway Company occupied, and upon which it had no property abutting, the parties by said ordinance contract could define, prescribe and limit the Railway Company's obligation as to pavement; because, the Railway Company not being an abutting property owner, no obligations were imposed upon it by general law. As to such streets, its obligations were created only by the contract, and were only such as the contract prescribed.

If this franchise contract by its terms and in its application does not refer solely to the city's streets which the Railway Company might occupy, but, on the contrary, is a contractual exemption from all paving assessments except for a space six and two-thirds feet wide for each track occupying such street, then suppose that the Railway Company owned a half block of ground lying between and abutting upon the two best business streets in the city upon which it has its terminal and a six-story office building, and note the result. In such case, having contracted to pave "a total width in area along the street so occupied (that is, by its tracks) of six and two-thirds feet for each track occupying such street," and that being its sole and only duty, and being a contractual exemption

from any further obligation as to pavements, its half block of ground upon which it maintains its terminal and office building, abutting directly upon two streets, is not assessable for paving those streets, though the other half of the block owned by merchants is assessable. Either we must accept that as the intention and effect of the ordinance, which would render it unlawful as in violation of the general law of the Territory of Oklahoma then governing and of the laws enacted upon the subject since statehood, and thus beyond the city's power (Sections 443-453 Rev. & Ann. Stat. Okla. 1903; and Sec. 619 Rev. Laws. Okla. 1910); or else we must say that the ordinance in question did not purport to deal with the general statutory obligation of abutting property owners as to paving, but was restricted in its intent and effect to streets of the city occupied by the tracks of the railway Company, and was creating an obligation with respect to paving those streets that did not then exist under the general law. This ordinance was enacted in January, 1902. The Act of the Legislature approved March 5, 1901, (Wilson's Rev. & Ann. Stat. Okla., 1903, Sec. 443-453) was then in force. That act contained no provision requiring either street railways or steam railways which were occupying the streets of a city to pave between their tracks, as the present law does (Sess. Laws 1907-8, p. 166, Sec. 1., Rev. Laws Okla. 1019, Sections 610-611). In all other essential respects the two laws are the same.

If the half block owned by the Railway Company for terminal and office building purposes is not attempted to be exempted from assessment by the ordi-

nance, then that is true because the ordinance did not deal with any kind or character of abutting property, but dealt only with streets owned by the city over which the Railway Company operated its cars. And if that is true, then the so-called private right of way, 40 feet wide, owned by the Railway Company in fee simple, to which the franchise did not extend, and which was never a street, avenue or alley of the city, is assessable for paving purposes.

The provision in Section 4 of the ordinance that wherever the said city should pave or re-pave "any *street upon which said line of street railway is constructed,* it shall be the duty of said Railway Company to construct or pay the cost of construction of *a* total width in area along *the street so occupied* of six and two-thirds feet for each track *occupying such street,*" shows, not only by the description of the streets as those "upon which said line of street railway is constructed," and as "the streets so occupied," but also by the very width the Railway Company was to pave, that it had reference only to streets owned or controlled by the city in which an easement was by the ordinance granted to the Railway Company, and not to any tract of land 40 feet wide owned by the Railway Company in fee. A pavement of that width would cover the space between each track and probably to the end of the ties on each side. But what would be gained by having the Railway Company pave a strip 13 1-3 feet wide, if it has two tracks, or 6 2-3 feet wide if it has only one track, in the middle of a strip 40 feet wide, leaving an unpaved space 13 1-3 or 16 2-3 feet wide between that and the curbing

of the paved streets? Indeed since the 40-foot strip is not a street, avenue or alley at all, and since it is not available to pedestrians, horses or vehicles, but a paved street on each side of it is, why pave the 40 feet at all? But plaintiffs in error insist that their duty was, upon the demand of the city, to pave or pay for paving, not the street, but this space within the forty-foot strip, whereas the ordinance contemplated the paving, not of the Railway Company's private right of way, but of the streets. And since this forty-foot strip was no part of the street, and the ordinance provided only for paving the streets, the Railway Company was under no contractual obligation in this case to pave at all, and its only obligation was the statutory obligation of an abutting property owner.

Section 4 of Ordiance No. 281 provided that upon the determination of the city "to pave any such street," that is, a street occupied by the Railway Company, then the city clerk shall notify the latter of that fact, whereupon the Railway Company shall declare its election in writing either to construct for itself that portion of the pavement for which it is liable, or permit the work to be done by the city at its expense. And it is stated by plaintiff in error that the city clerk never gave it such notice, and that, therefore, it never became obligated to pave a strip 13 1-3 feet wide within the 40-foot strip. The very fact that such notice was not given, and that the city assessed to the Railway Company its benefits and proportionate part of the cost of paving these streets, and that the resolution was to pave, not the railway right of way, but the streets, showed the city's interpretation of the

ordinance as applying only to streets occupied by the Railway Company, and not to abutting land, whether used as a right of way or for other purposes, owned by the Railway Company.

There is nothing in the Act of the Territorial Legislature (Art. 4, Chap. 9 Sess. L. Okla. 1903, p. 141) legalizing franchises theretofore granted street railway companies in cities of the first class, which can affect the question. Section 2 of that act authorizes street railway companies, with the consent of the authorities of any city or town, to construct a system of street railways *upon such streets* on such terms and conditions as may be agreed upon; and Section 3 provides that all franchises theretofore granted, which have not lapsed or become forfeited, are legalized. We assume the legality and validity of the franchise ordinance, but we affirm that its correct interpretation did not vest in plaintiff in error the rights and exemptions for which it is contending. Nor did the validating act intends to authorize any city to exempt any Railway Company as an abutting property owner from the assessment of its abutting property for paving purposes. Moreover the Railway Company did not acquire or uose this 40-foot strip under the validated franchise. The franchise had no application to the 40 foot strip.

In *Minneapolis* v. *Street Ry. Co.*, 215 U. S. 417, this court laid down the following as a rule for the construction of franchise ordinances in determining claims of contract rights and exemptions made thereunder:

"In considering the terms of this ordinance and what it undertook to accomplish on its face, we are to bear in mind that public grants of this character are not to be extended by implication, and that all that is granted must be found in the plain terms of the act. This principle has been so frequently and recently announced in this court that it is unnecessary to cite the cases which have established it."

It is a well settled rule of construction that grants of franchise rights to street railway companies are to be strictly construed against the grantees and in favor of the public.

Cleveland Electric R. Co. v. *Cleveland, etc., R. Co.*, 204 U. S. 116.
Blair v. *Chicago*, 201 U. S. 400.

It is also a well settled rule that claims of contractual exemption, based upon franchises, from taxation, special assessments and regulation of rates, involving, as such exemption does, the suspension of a governmental power, will not be allowed from mere implication or construction; but such exemption must be express and granted beyond a reasonable doubt, and the municipality granting the same must have express statutory authority to grant it.

Tucker v. *Ferguson*, 22 Wall 527.
Seton Hall College v. *South Orange*, 242 U. S. 100.
Railway Co. v. *Philadelphia*, 101 U. S. 528.
Schurg v. *Cook*, 148 U. S. 397.
New Orleans City, etc., R. C. vv. *New Orleans*, 143 U. S. 192.

The Supreme Court of Oklahoma construing this same Ordinance No. 281 with respect to the obligation of this same Railway Company for paving assessments, in *Oklahoma City* v. *Shields*, 22 Okl. 265, 293, said:

> "Whoever insists that any particular property is not subject to the same burdens as imposed by law on the same character of property similarly circumstanced, has the burden of proof, and must make it clear that by contract or otherwise the property is beyond its reach. Claims of exemption from taxation must be plainly and unmistakably supported by express grant. It cannot exist by implication only. A doubt is fatal to the claim. The universal rule is that, whenever a privilege granted to a corporation comes under revision in the courts, the grant is to be strictly construed against it, and in favor of the public, and nothing passes to the corporation but what is granted in clear and explicit terms. What is not unequivocally granted, is taken to be withheld. *New York ex rel. Metropolitan Street Railway Co.* v. *State Board of Tax Com'rs*, 199 U. S. 35, 25 Sup. Ct. 705, 50 L. Ed. 65; *St. Louis* v. *United Railway Co.*, 210 U. S. 266, 28 Sup. Ct. 630, 52 L. Ed. 1054; *Wilmington & Weldon R. R. Co.* v. *Alsbrook*, 146 U. S. 279, 13 Sup. Ct. 72, 36 L. Ed. 972; *Ford* v. *Delta & Pine Land Co.*, 164 U. S. 662, 17 Sup. Ct. 230, 41 L. Ed. 590; *Memphis Gaslight Co.* v. *Shelby County*, 109 U. S. 398, 3 Sup. Ct. 205, 27 L. Ed. 976; *Vicksburg S. & P. R. R. Co.* v. *Dennis*, 116 U. S. 665, 6 Sup. Ct. 625, 29 L Ed. 770; *Chicago Theological Seminary* v. *Illinois*, 188 U. S. 662, 23 Sup. Ct. 386, 47 L. Ed. 641; *Erie R. Co.* v. *Pennsylvania*, 21 Wall. 492, 22 L. Ed. 595; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773; *New Orleans & Lake City R. R. Co.* v. *New Orleans*, 143 U. S. 192, 12 Sup. Ct. 406, 36 L. Ed. 121; *Peoples' Passenger R. R. Co.* v. *Memphis R. R. Co. et al.*, 10 Wall. 38, 56, 19 L. Ed. 844; *Denver R. R. Co.* v. *Denver City R. R. Co.*, 2

Colo. 673; *Lasher* v. *People*, 183 Ill. 226, 55 N. E. 663, 47 L. R. A. 802, 75 Am. St. Rep. 103; *Metropolitan R. R. Co.* v. *Chicago West Div. R. R. Co.*, 87 Ill. 317; *Fair Haven & Westville R. R. Co.* v. *City of New Haven*, 203 U. S. 379, 27 Sup. Ct. 74, 51 L. Ed. 237; *Greenwood* v. *Freight Co.*, 105 U. S. 13, 26 L. Ed. 961; *Rice* v. *R. R. Co.*, 66 U. S. 358, 27 L Ed. 47.

"There is nothing in Section 4 of the ordinance *expressly exempting the street railway company from any additional paving, it being merely stipulated therein that it shall pave* the space or area between the rails when the municipality required paving to be done by the abutting property owners on such street or streets, or elected to do so itself. In line with the authorities which hold to the effect that unless such exemption is clearly expressed the same will not be presumed by implication, we conclude that there is no exemption in this ordinance that precludes the legislative power of the state from imposing such additional burden upon the street railway company, especially when the same is reasonable, proper, and just, but if we had any doubt as to this conclusion, and we have not, we would resolve such in favor of the public. Taxation should be imposed by the sovereignty, so far as it can be, with justice and equality to all. *Paving should be a common burden to all abutting proprietors, and should be borne by common contributions under fixed rules, apportioned as far as practicable according to justice and equity.* It is necessary that streets should be paved in the building of cities, that travel may be facilitated and sanitation promoted. The street railway company is one of the greatest recipients of the benefits from such improvements."

The case of *Enid City Ry. Co.* v. *City of Enid*, 43 Okla. 778, is entirely different from the present case.

There the City of Enid was not undertaking to assess any abutting property of the Railway Company; it was not dealing with the Railway Company as an abutting property owner; but it was undertaking to enlarge the Railway Company's franchise obligation to pave a strip 62 3 feet wide along the streets occupied by its tracks, and to make it pave 13 inches more. The Railway Company had no lots or land abutting on those streets. It was not assessable under the general law of the State, and its sole obligation was created by the ordinance. That is a very different case from this one, and that difference was adverted to by the Supreme Court of Oklahoma in its opinion in this case, as follows:

> "The section of the statute, *as well as the ordinance and deed of dedication*, referred to under the first proposition urged, and the authorities cited by counsel in support of this proposition, *have reference to street paving along the surface of which the tracks of the railway company are laid, and the space actually occupied as a right of way over which the railway company has an easement only. They have no application to a private right of way to feet in width in which the railway company owns the fee, and along the center of which the tracks are laid. In the case of Oklahoma City* v. *Shields*, 22 Okla. 265, 100 Pac. 559, in discussing the assessment against the right of way of a railroad it was said:
>
> " 'These railroad companies do not own their several rights of way, but simply occupy them and have easements therein obtained from the public. *If in any case they have purchased and own the land occupied by and adjoining the right of way, there is no reason why in such cases the assessments should not be made against the land so owned, and in this event the plan of assessment would be*

the same as against the individual—the natural person. This rule applies equally to street railways who own any portion of their right of way and abutting lands.'"

The same distinction also exists between this case and the cases of *Chicago* v. *Sheldon*, 9 Wall. 50, and *Coast Line R. Co.* v. *Savannah*, 30 Fed. 646. In the latter cases the obligation of the Railway Companies as abutting property owners was not involved, but merely their contractual obligations as to streets which they occupied and upon which they had no abutting property.

The decision of the Supreme Court of Oklahoma in this case to the effect that Ordinance No. 281 had reference only to the obligation of the Railway Company with respect to the pavement of streets occupied by it, and had no application to the assessability of a private right of way, 40 feet wide, and owned by the Railway Company in fee, is reasonable and plausible. In that connection, this court said in *Tampa Water Works* v. *Tampa*, 199 U. S. 241, 243:

> "In such circumstances, although we construe the constitution for ourselves and determine the existence or non-existence of the contract set up and whether its obligation has been impaired by the state enactment, *Douglas* v. *Kentucky*, 168 U. S. 502, 'the Federal Courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt,' a principle reinforced by the later cases. *Burgess* v. *Seligman*, 107 U. S. 20, 34; *Wilson* v. *Standefer*, 184 U. S. 399, 412; *Bienville Water Supply Co.* v. *Mobile*, 186, U. S. 212, 220; *Chicago Theological Seminary* v. *Illinois*, 188 U. S. 662, 674, 675, 677."

We submit, therefore, that the contractual exemption here claimed never in fact existed.

It being determined that plaintiff in error has no contractual exemption from the assessment of its abutting property for paving purposes, the question whether a private right of way of a street railway company, 40 feet wide, and owned by it in fee simple, is assessable for such purpose is not a federal question. It is purely a local question, determinable by the general laws of the State, and upon which the decision of the Supreme Court of the State is conclusive. There is nothing in the Constitution of the United States or in any law or treaty made thereunder which purports to exempt such property from such assessment

L. & N. R. Co. v. *Barber Asphalt Paving Co.*, 197 U. S. 430.

II.

The dedication or conveyance of the property in question contained no provision purporting to exempt the same from assessment under the general law of the State for paving purposes; and if it had done so, such provision would have been void.

The dedication of the 40 foot strip to the Railway Company, contains the following:

"Said strips of land are set aside for the exclusive use of and dedicated to the Oklahoma City

and Suburban Railway, its successors and assigns, with a like effect as though deeded and conveyed to said Company in fee simple by separate deed, subject, however, to the following conditions:

"Said Oklahoma City and Suburban Railway shall be subject to all the reasonable police regulations and shall provide crossings over its tracks at all street crossings and when said boulevards are paved said Company shall curb its private right of way and pave street crossings over same."

And it is contended by plaintiff in error that the provision therein to the effect that the Railway Company should at all times be subject to police regulations, and should provide crossings over its tracks at all street crossings, and that when the boulevards should be paved the company should curb its private right of way and pave the street crossings, also constituted an exemption from the statutory liability as an abutting property owner from a paving assessment. We see nothing in the provision indicating any intention on the part of the dedicator to undertake to exempt the Railway Company from paving assessments upon the property thus conveyed to it. The imposition of certain duties by the grantor involves no denial on his part of the State's right to impose any burdens which the State could otherwise have imposed. The obligation therein imposed upon the Railway Company to curb its private right of way thus granted it, and to pave the street crossings, was an obligation imposed by the grantor as a condition of the grant, one of the considerations for it; and was a burden over and above and in addition to such burdens as the general law of the State might impose upon the property. Certainly, under the terms and provisions of the dedication, the Railway Company was

under no obligation to the dedicator to do anything more than to curb the strip and pave the crossings. But the obligation to respond to a paving assessment was created by a general law of the State, and was due, not to the dedicator, but to the State or the city. It did not arise from the dedication, but from the statutes of the State operating upon the property after the Railway Company acquired it, just as those statutes would have operated upon it if no dedication or conveyance had been made. No one can possibly deduce from the dedication any intention on the part of the dedicator to place the granted property beyond the assessing power of the State.

But even if the dedicator had so intended, and had expressly so provided, the provision would have been void. The owner of real estate cannot withdraw it from the jrisdiction of the State while it belongs to him, and surely he cannot do so by imposing conditions in a conveyance thereof to another.

Chicago & Alton R. Co. v. *McWhirt*, 243 U. S. 422.
Texas & N. O. R. R. Co. v. *Miller*, 221 U. S. 408.
St. Louis & S. F. Ry. Co. v. *Mathews*, 165 U. S. 1.
Chicago & Alton R. Co. v. *Tranborger*, 238 U. S. 67, 76.

A condition in a conveyance of property that it should never be liable to taxation, special assessment, or to the exercise of the right of eminent domain would be void. This dedication was made in November, 1909. Article 12 of Chapter 10 of Revised Laws Oklahoma,

1910, was then in effect, Section 619 of which made all lots, pieces or parcels of land abutting on a street to be paved assessable to pay the cost thereof. The grantor of the tract could not exempt it from that obligation in the grantee's hands by a provision in the conveyance any more effectually than he could declare it exempt in his own hands. Parties may not make a contract in denial of the State's lawful power to tax, assess or regulate, and then complain that the State's exercise of its power unconstitutionally impairs the obligation of that contract.

Union Dry Goods Co. v. *Georgia Pub. Serv. Corp.*, 248 U. S. 372.
Manigault v. *Springs*, 199 U. S. 473, 480.
Hudson County Water Co. v. *McCarter*, 209 U. S. 349, 357.

In 3 Dillon on Municipal Corporations, 5 Ed., Sec. 1075, it is said:

"Thus, the proprietor cannot confer upon a county or extraneous corporation the control of streets in a city, and deprive the proper municipal corporation of the control given to it by law. If an *invalid condition* is annexed to the dedication, it has been held that *the condition only is void*, and that the grant or dedication is not affected thereby."

In *Richards* v. *Cincinnati*, 31 Ohio St. 506, the third paragraph of the syllabus is as follows:

"Where lands within a municipal corporation are laid out into lots, streets and alleys, and the streets are dedicated to the public by a deed which contains a condition that the lots shall be exempt from charges for the improvement of the streets unless a majority of the abutting owners shall assent thereto in writing, such dedication of the lands

for streets and alleys will take effect, but the condition is inoperative."

In *Jones* v. *Carter* (Tex.) 101 S. W. 514, the second paragraph of the syllabus is as follows:

> "Where the owners of land adjacent to a city platted the same and executed deeds to the city for the streets, alleys and public grounds, reservations therein to the grantors of the exclusive right to use the streets for maintenance of lighting appliances, sewers, gas, waterworks and telephone lines, free from the city's control, were contrary to public policy, and void as tending to create a monopoly."

In *Edwards H. & C. R. Co.* v. *Jackson*, (Miss.) 51 So. 803, the third paragraph of the syllabus is as follows:

> "A city may not contract away its charter powers to require the paving of streets and assess a part of the cost on abutting property."

In *Denver* v. *New York Trust Co.*, 229 U. S. 123, it is held that provisions in a water franchise that upon its expiration the plant "may be purchased" by the city, and that "the city may at its election renew the contract," do not require the city to do either.

Nor did the act of the City of Oklahoma City in annexing Linwood Addition to the city create a contractual exemption between the city and the railway company of the latter's property from assessment for paving purposes, nor did it ratify, confirm or give validity to any attempted exemption contained in the conveyance of said property to the railway company, if any such there was, for several reasons. In the first place, the annexation of adjacent territory to a city is

not a contract, and it creates no estoppel against the city. In annexing an addition to the city, the city does not deal with persons or corporations, as in the case of contracts; but the act is legislative in character and operates *in rem* upon the territory annexed. By such annexation the city is no more bound by any unlawful or illegal contracts entered into between property owners in the addition, than would the state be bound by such contracts prior to the annexation.

In the second place, the power of the city with respect to the assessment for paving was created, granted, and defined by the general laws of the state, which required all lots, pieces and parcels of land abutting upon the street to be paved to be assessed to pay the cost thereof. In the face of that statutory provision creating and limiting the city's power in that respect, the city would have had no right even by express contract to exempt any abutting land owner from the payment of his just and fair portion of the cost of paving, and to cast his portion of the burden upon his neighbor; and if the city would have had no power to create such exemption by express contract, then certainly it would have had no power to confirm, ratify or validate an existing illegal contract between private persons to that effect.

But, as we have shown, the dedication itself did not purport to create such exemption, and moreover the city did not do any act indicating any recognition of such exemption. On the contrary it assessed the railway company for its portion of the benefits.

The case of *Browne v. Palmer*, 66 Neb. 287, cited by

plaintiff in error as being an exact authority here, is not in point. There Hascom and Megeath had conveyed to the city of Omaha a large tract of land for park purposes, and also a strip of land 80 feet wide surrounding the park for the purpose of a public highway. The conveyance was made upon the express condition that the city should lay out and improve the street or highway, and keep the same in good order and repair at the city's expense; and the deed provided that if the city should fail or neglect to do so, then the title to said street or highway should revert and reinvest in the grantor. The Supreme Court of Nebraska held that the city by accepting that conveyance became bound by the terms thereof, and that the city was obligated to keep the highway in repair at its own expense, and could not charge the expense thereof to abutting property acquired from the city's grantors. In that case however the dedicator or grantor dealt directly with the city. It made no grant to a third person, as did the dedicator here. The conveyance was to the city. The grant was beneficial to it, and the condition was a consideration for the grant. If the conveyance in that case had been to some private person or corporation, the city's rights would not have been affected; but as it was, the conveyance constituted a contract directly between the grantors and the city. It is presumed that the city had power to accept the grant, which implied the power to accept the conditions upon which the grant was made.

The same principle above noticed pervades all the other authorities cited by the plaintiff in error upon this question.

III.

The proceeding in and decree of the trial court, and the affirmance thereof by the Supreme Court of Oklahoma, do not deprive the Railway Company of its property without due process of law.

In the proceeding in the trial court the Railway Company offered evidence, the purpose of which, it declared, was to show the value of the private right of way, and that no benefit accrued to it from the paving, or if any benefit did accrue, then the amount thereof. This evidence the court declined to receive, and the Railway Company contends that such ruling operates to deprive it of its property without due process of law, in that it was deprived of a hearing in the apportionment of the benefits.

That the court did not err, and that it violated no constitutional right of the Railway Company in excluding the offered evidence, is evident from the fact that the law governing the paving proceedings did not commit to the court the power to determine whether property fronting or abutting upon the improvement was benefitted or the power to apportion the benefits. But, on the contrary, the law (Sections 618, 619 and 621, Rev. Laws Okla. 1910) committed to a board of appraisers to be appointed by the mayor and council the duty of appraising and apportioning the benefits to the several lots and tracts of land, and to the mayor and council itself the duty of reviewing and correcting said appraise

ment and apportionment as made by the board of appraisers. The appraisal or apportionment of benefits was not a judicial function. The district court had no appellate jurisdiction over the action of the board of appraisers or the city council, and no power to review, revise, modify or reverse their action.

Moreover, the mandamus action was not for the purpose of substituting the court's judgment or discretion for that of the appraisers and the council in the apportionment which had been made, or of controlling whatever discretion they had in whatever remained for them to do. Assuming for the sake of argument that, if an arbitrary and grossly unjust apportionment of benefits should be made, the court, in a proper proceeding brought by the property owner for that purpose, would have power to enjoin the making of an assessment thereon or the enforcement of an assessment made, nevertheless that was not the nature or character of the mandamus action. Here, one or the other of two conditions existed. Either the apportionment of benefits had already been made by the appraisers and reviewed and confirmed by the council upon due and legal notice given, in which case the Railway Company had had its opportunity to be heard, and therefore had had due process, and the apportionment was valid and was conclusive upon the court in this action, so that the court's powers were restricted merely to requiring the city council to perform its statutory duty from that point on by passing the assessing ordinance (Sections 630 and 631, Rev. Laws Okla. 1910) properly describing the property and levying the assessment thereon so that the paving lien would attach; or else the appraisal and

apportionment of the benefit was itself void, in which case it was the duty of the court, not itself to apportion the benefit, but by mandamus to require that a new appraisement and apportionment be made by the proper board and officers and a new assessment levied as provided by the statute. In neither event was it for the court to determine what the value of the property was, whether there was any benefit, and if so the amount thereof. Either that had previously been lawfully determined by persons authorized by law to determine it, which bound the court; or else it remained for such persons so authorized yet to do it, and not for the court. This, we think, is elemental. It was merely the court's duty to require the city officials to perform such of their statutory duties as they had not performed, and it was not the court's duty to hear and determine any matter which the law had committed to the determination of the city officials. If the board of appraisers and the city council had previously made the appraisal and apportionment of benefits in the manner and upon the notice provided by statute, that was well and good and ended the matter so far as the appraisal and apportionment was concerned. If they had not made such appraisal and apportionment, then it was for them yet to do so, and to be required to do so by mandamus. It was not for the court to do so. Whether this property was benefitted, and if so, what apportionment of benefits should be made as to it, was not within the scope of the inquiry in this mandamus action. The offered evidence in regard to the value of the property and the extent of the benefit did not relate to any issue in this mandamus proceeding, to any

question within the province of the court to determine. It was wholly irrelevant.

There remains for consideration the question whether, under the evidence and the finding and judgment of the district court, the Railway Company had had an opportunity to be heard upon the question of benefits, and therefore whether the judgment ordering the city commissioners to reassess upon the private right of way of the Railway Company by a proper description the sum of $12,046.16 theretofore apportioned by the board of appraisers as its benefit, deprives the Railway Company of its property without due process of law.

There is a distinction between the appraisal and apportionment of benefits and the levy of the assessment. It is true that, by Section 630, Rev. Laws Okla. 1910, the assessment is to be levied in conformity with the appraisement and apportionment, so that, if due process should be denied in the apportionment of benefits, we presume the assessment would be invalid. But they are different acts, performed at different times, in a different way and for a different purpose; and a technical legal description of the land assessed might be required by the court in the assessment, while a mere general description capable of identifying the land be held sufficient for the apportionment of benefits, without raising any federal question.

Thus, Section 626, Rev. Laws Okla. 1910, provides that, after letting the paving contract and ascertaining the total expense of the improvement, "the mayor and

council shall by resolution appoint a board of appraisers to appraise and apportion the benefits to the several lots and tracts of land, which shall be designated in said resolution, *according to the record title thereof in the county.*" It is provided therein that "any error in the designation of the *owner of record* of any lot or tract liable for assessment shall not invalidate the assessment or the lien thereof."

Section 627 of the same statutes provides that it shall be the duty of the appraisers "to proceed to appraise and apportion the benefits to such lots and tracts of land as shall have been designated by the council, *according to the title as aforesaid,*" and to file a written report thereof with the city clerk.

The Statutes then provides as follows:

628. "When said report shall have been so returned, the mayor and council shall appoint a time for holding a session to hear any complaints or objections that may be made concerning the appraisement and apportionment as to any of such lots or tracts of land, and notice of such session shall be published by the city clerk in five consecutive issues of a daily newspaper, or two issues of a weekly newspaper, published and of general circulation in said city. The time fixed for said hearing shall be not less than five nor more than ten days from the last publication.

629. "The mayor and council at said session shall have the power to review and correct said appraisement and apportionment, and to raise or lower the same as to any lots or tracts of land, as they shall deem just, and shall, by resolution, confirm the same as so revised and corrected by them.

630. "Assessments in conformity to the appraisement and apportionment as corrected and

confirmed by the council shall be payable in ten equal annual installments, and shall bear interest at the rate of seven per cent per annum until paid, payable in each year at such time as the several installments are made payable. The mayor and council shall, by ordinance, levy assessments in accordance with said appraisement and apportionment, as so confirmed against the several lots and tracts of land liable therefor.

631. "As soon as the assessing ordinance is adopted, the city clerk shall prepare a book which shall be known as the "Street Assessment Record," in which he shall enter the name of each person owning property to be assessed, as ascertained from the records of the county, or, in case the name of any owner is not known, a statement to that effect, a description of the lot, tract or subdivision, with a blank space for entering the amount of the assessment as ascertained by the appraisers, with a suitable column for entering the payments which may be made on account of such assessment. As soon as the appraisement is completed, the clerk shall extend upon said record, opposite the name of each property owner, a description of the property and the amount of the assessment. Immediately after the approval of the city council of any portion of the work herein provided for, the clerk shall mail to each property owner whose property is liable for the work so completed and approved, and whose name and address can be ascertained, a notice giving the date of said approval, a description of the property, prepared from his records, the amount of the assessment against such property, and notifying said property owner that said assessment may be paid within thirty days from the date of the approval of the work as aforesaid, together with interest thereon at the rate of seven per cent per annum from the date of said assessing ordinance, not exceeding a period of four months; and he shall also at the same time, cause a like notice to be pub-

lished in some daily or weekly newspaper published and of general circulation in the city."

It is to be observed that neither Section 626 nor 627, dealing with the manner of appraisement, have anything to say as to the method of describing the property to be appraised. They deal with the title and not the description of the property. Presumably any description sufficient to identify the property would suffice, and certainly such description would fulfill the requirements of due process of law.

Now, the resolution of the council to pave, which was published in six consecutive issues of a newspaper in said city, named the street and the portion thereof to be paved. It was there resolved to pave Linwood Boulevard from the center of Sixteenth Street to the east line of Grand Boulevard (Printed Tr. 81). It was between the two driveways of Linwood Boulevard that the private right of way in question was situated. The publication was notice to every owner of property abutting upon the driveways of Linwood Boulevard between Sixteenth Street and Grand Boulevard of the council's intention, and that his abutting property would subsequently be assessed to pay the cost of the pavement.

The resolution of the council appointing the appraisers (Printed Tr. 105) set forth a "statement of lots and tracts of land to which are to be apportioned the benefits resulting from paving and otherwise improving Linwood Boulevard from the center line of Sixteenth Street to the east line of Grand Boulevard" (Printed Tr. 106), the last description of which is "Oklahoma Railway Right-of-way, Oklahoma City" (Printed

Tr., top of p. 109). Everybody knew, the Railway Company included, that by this was meant that portion of the right of way on Linwood Boulevard extending from the center line of Sixteenth Street to the east line of Grand Boulevard.

Thereafter, on November 15, 1911, the appraisers filed their report with the city clerk (Printed Tr. 111) which contained the same description of the portion of the street to be paved as did the resolution appointing them (Printed Tr. 112), and which contained the following, "Oklahoma Railway, Right-of-way, $12,046.16" (Printed Tr. 114).

Upon the filing of this report notice was published daily from November 22nd to November 27th, inclusive, that on December 4, 1911, at 9:30 a. m. the city commissioners would meet in the city hall for the purpose of reviewing the report, which was published with the notice, and of hearing and adjusting any complaints thereon and correcting any errors therein; and the notice also described the portion of Linwood Boulevard to be paved (Printed Tr. pp. 109, 110). On December 4th, the city commissioners met for the purpose of hearing any complaints or objections and revising and correcting the apportionment; but no complaints or objections were made, and the appraisement and apportionment were thereupon confirmed. (Printed Tr. 115.)

Now the purpose of the appraisement and apportionment was to apportion the cost of the pavement justly to each lot, piece or parcel of land chargeable therewith. It was to apportion the cost. It dealt with amounts of money. Its purpose was not to fasten a

lien upon property and therefore to furnish a technical legal description of the property looking to a foreclosure suit, but it was to apportion sums of money. And if from the whole published proceeding, including the resolution to pave and the report of the appraisers, all describing that portion of Linwood Boulevard to be paved, between the driveways of which the private right-of-way lay, it was apparent that it was that portion of the Railway Company's right of way lying between the driveways on Linwood Boulevard and extending from the center of Sixteenth Street to the east line of Grand Boulevard, to which the apportionment was made, then the law and due process of law were fulfilled. The publication was notice to the Railway Company that this sum was apportioned to it. It had a right to appear before the city commissioners and complain of the amount and even procure a correction in the description if it saw fit, but it came not. It stood by and saw the pavement laid, and still it came not.

Now after the confirmation of the report of the appraisers it became the duty of the city commissioners to pass an ordinance levying assessments upon the several lots and tracts of land in accordance with the appraisement and apportionment; that is, to assess upon the lots and tracts the amounts apportioned to them (Section 630, Rev. Laws Okla. 1910), which assessment was to create and constitute a lien upon the lot or tract to secure the payment of the sum assessed (Sec. 634, *id.*). The necessity for an accurate legal description of the property assessed existed here, not by virtue of any specific requirement of the statute to that effect, but from the very nature and purpose of the assessment,

the fact that it was intended to create a lien which it might be necessary to foreclose. A mortgage upon real property insufficiently or inaccurately described is subject to reformation by the court, but an ordinance of the city is not subject to reformation by the court. The court having no power to reform the assessing ordinance, the only remedy was to mandamus the city commissioners to pass another ordinance reassessing the property by a certain, definite and accurate description.

The trial court, therefore, in its judgment found that all of the paving proceedings were regular, legal and valid up to the passing of the assessing ordinance (Printed Tr. 128), and it commanded the city commissioners, not to reapportion the benefit, but to reassess against the private right of way by a proper description thereof the sum of $12,046.16 theretofore apportioned to it. Notice of the resolution to pave having been duly published describing the street and the portion thereof to be paved, and specifically naming the Oklahoma Railway right of way as property to which was to be apportioned a part of the cost, and the report of the appraisers apportioning a part of the benefit to the Oklahoma Railway right of way having been duly published, together with a notice of the time and place when and where the city commissioners would meet to hear any complaints or objections to the apportionment, the Railway Company had had due and legal notice, an opportunity to be heard, and it was not by the proceeding, and is not by the judgment of the court, denied due process of law. It knew and everybody knew that the benefits were apportioned merely to that portion of the right of way abutting upon that portion of the street to be paved,

in conformity with the statutory direction that the lots, pieces or parcels of land fronting or abutting upon the improvement to be made should be charged with the cost thereof.

Assuming, therefore, as the Railway Company contends, that the decision of the Supreme Court of Oklahoma in this case was an unqualified affirmance without modification of the trial court's judgment, it does not result in depriving the Railway Company of its property without due process of law.

Is the decision of the Supreme Court an unqualified affirmance? We have just discovered that the opinion of the court found on pages 134 to 142 of the printed transcript is not in the full form in which it was finally handed down by the court. The opinion was corrected and refiled on December 4, 1917 (170 Pac. 217). We presume that this corrected opinion is shown in the original transcript, which is not before us.

In that opinion the court said:

> "Thus it will be seen that when the commissioners proceed in obedience to the decree of the court to reassess the property of the railway company, an opportunity will be given the company to be heard and to complain or object to the amount of the assessment. The lower court found that the assessment made by the appraisers was invalid and insufficient as an assessment against the property of the railway company, for the reason that it was made against the company, and the property subject to assessment was not described with sufficient accuracy. The writ commanded the city commissioners to reassess this right of way by proper description. After the determination to make the improvements and letting of the contract, no discretion

of any kind is vested in the mayor and commissioners so far as making the assessment is concerned. The provisions of the statute requiring the appointment of appraisers to appraise and apportion the benefits to the several tracts of land within the improvement district, and the making of such appraisement and apportionment, are mandatory. *City of Norman* v. *Allen*, 47 Okla. 74, 147 Pac. 1002; *El Reno* v. *Paving Co.*, 25 Okla. 648 107 Pac. 163, 27 L. R. A. (N. S.) 650. The lower court found that all of the proceedings, resolutions, and actions of the mayor and city council up to and including the ordinance levying the assessments were regular and in accordance with law in all respects, except that the property of the railway company was not described with sufficient accuracy to sustain the assessment against the company. In appointing the appraisers and in describing the property subject to assessment no discretion is vested in the municipal authorities; therefore the writ in directing the authorities to reassess the property by proper description does not seek to control any discretion. While it is true the writ in directing the reassessment by proper description names the amount fixed by the appraisers, this cannot be said to be a control of discretion of the appraisers. There appears to have been no controversy as to the amount, the railway company denying any liability whatever. Since the assessment must be made under the provisions of Section 644, *supra*, as an original assessment, it follows that the amount as fixed by the void assessment is immaterial."

If by this it is meant that appraisers will again be appointed to apportion the benefit, that the city commissioners will again appoint a time for hearing objections thereto, and will only after those things have been done pass a new assessing ordinance, then the judgment as affirmed will not deny the Railway Company due

process, even if the assessment upon the basis of the previous apportionment would. If by the opinion it is meant that, without any further action by the appraisers, the commissioners when they come to pass the assessing ordinance, must hear any complaints or objections of the Railway Company to the previous apportionment made, still it will not deny the Railway Company due process, even if to deny them the right to hear the Railway Company further would do so. For in each instance the Railway Company will have an opportunity to be heard upon the question of benefits. That is a matter which, without a formal modification of the trial court's judgment, will be controlled by the mandate of the Supreme Court of Oklahoma, to which in Oklahoma the opinion of the court is attached and made a part, and which directs further proceedings in accordance with the opinion thereto attached.

In either event, whether the decision of the Supreme Court be considered as affirming the judgment without modification, or as modifying it to the extent of granting a further opportunity to the Railway Company to be heard upon the question of benefits before the new assessing ordinance is passed, the Railway Company has not by the decision been denied due process of law.

It is contended by the Railway Company that the assessment exceeded the value of the property assessed. We think that question is not involved here; but we wish to suggest that the company contends that under its franchise its duty was itself to pave or pay for paving a space six and two-thirds feet wide for each track, or in all thirteen and one-third feet wide, and that that was the limit of its possible obligation here. The two

driveways that were paved were each twenty feet wide, making a total paved width of forty feet, and the cost was $58,673.23 (Printed Tr. pp. 104-5). The portion to be paved by or at the expense of the Railway Company therefore was one-third of forty feet in width, and the cost to it would have been one-third of the $58,673.23 or $19,557.74, being $7,500.00 more than was assessed to it.

Section 644, Rev. Laws Okla. 1910, which was enacted by the first State Legislature and is still in force, is as follows:

> "No suit shall be sustained to set aside any such assessment, or to enjoin the mayor and council from making any such improvement, or levying or collecting any such assessment, or installment thereof, or interest or penalty thereon, or issuing such bonds, or providing for their payment, as herein authorized, or contesting the validity thereof on any ground, or for any reason other than for the failure of the city council to adopt and publish the preliminary resolution provided for in cases requiring such resolution and its publication, and to give the notice of the hearing on the return of the appraisers, unless such suit shall be commenced not more than sixty days after the passage of the ordinance making such final assessment: Provided, that in the event that any special assessment shall be found to be invalid or insufficient in whole or in part, for any reason whatsoever, the city council may, at any time, in the manner provided for levying an original assessment, proceed to cause a new assessment to be made and levied, which shall have like force and effect as an original assessment."

The construction of this paving was done with the knowledge of the Railway Company. Mr. Shartel testi-

fied that he was vice-president of the Railway Company (Printed Tr. 65), and that he had a conversation with Mr. Derr or Mr. Severns, representatives of the paving company, about the paving before or about the time it was commenced, in which he stated to them that "we were standing pat under our plat provision" (that is, under the assumed exemption contained in the dedication), and that the Railway Company was denying not the sufficiency and legality of the description of the right of way or the opportunity to be heard as to benefits, but any liability at all on the ground of the claimed exemption in the dedication of the right of way. He further testified that the matter was one of general notoriety. (Printed Tr. 71-2.)

The Railway Company therefore knew that the pavement was being laid. It knew that it was expected to bear its portion of the cost. It knew that publication of the resolution to pave and of the time and place for the hearing of objections to the apportionment of benefits had been made, and that the proceedings involved it. It took no steps in the matter. In *City of Bartlesville* v. *Holm*, 40 Okla. 467, the Supreme Court of Oklahoma in a similar case said in the syllabus:

> "Where jurisdiction is conferred upon a municipal body to provide for paving its streets and charge the cost thereof against the property benefitted, according to the method provided by law, a property owner who stands by while such work is being prosecuted, with full knowledge that large expenditures are being made for such improvement which will benefit his property, or, upon due notice, fails to appear at the proper time and before the tribunal prescribed by law, and present his objections, if he have any, will not, after the work is

completed, be afforded relief by injunction against assessments levied against the property benefitted to pay for such work."

To the same effect is *Norris* v. *City of Lawton* (Okla.) 148 Pac. 123; *City of Coalgate* v. *Gentilini* (Okla.) 152 Pac. 95; *Terry* v. *Hinton* (Okla.) 152 Pac. 518; *Chickasha* v. *O'Brien* (Okla.) 159 Pac. 282; *City of Perry* v. *Davis*, 18 Okla. 458; *Kerker* v. *Bocher*, 20 Okla. 729; *Paulsen* v. *El Reno*, 22 Okla. 734; *Jenkins* v. *Oklahoma City*, 27 Okla. 230; *Lonsinger* v. *Ponca City*, 27 Okla. 397; *Weaver* v. *City of Chickasha*, 36 Okla. 226; *Shultz* v. *Ritterbush*, 38 Okla. 478.

This court held likewise in the case of *Shepard* v. *Barron*, 194 U. S. 553, and held that the property owner was not thereby deprived of his property without due process of law.

Upon the foregoing we submit that the judgment of the District Court of Oklahoma County and the order of the Supreme Court of Oklahoma affirming the same should be by this court affirmed.

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OKLAHOMA RAILWAY COMPANY *v.* SEVERNS PAVING COMPANY ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 106. Argued November 19, 20, 1919.—Decided December 8, 1919.

A decree of a state court directing an assessment of land to pay for a public improvement should not be so framed as to leave in doubt the right of the property owner to be heard on the amount of the assessment. P. 107.

In platting land outside of a city the owners dedicated in fee to a street railway company, to induce it to extend its line, a strip, for a right of way, 40 feet wide, along the center of a boulevard, on condition that the strip be subject to reasonable police regulations and that the grantee construct crossings and curb and pave them whenever the boulevard should be paved. *Held*, that the strip was subject to special assessment by the city for paving

the roadways of the boulevard, after inclusion in the city limits, and that the company's contract rights were not thereby impaired. *Id.*

Provisions in a street railway franchise defining the grantee's obligation to pave certain portions of the city streets occupied by its lines, *held* not to affect the city's right to impose a paving tax on a strip of land, in the center of the street paved, owned by the company in fee. *Id.*

67 Oklahoma, —, modified and affirmed.

THE case is stated in the opinion.

Mr. John B. Dudley and *Mr. Henry G. Snyder*, with whom *Mr. Henry E. Asp* was on the brief, for plaintiff in error, contended:

(1) That the duty of the company as to paving was fully defined in its franchise from the city, and could not be enlarged without impairing that contract.

(2) That the company's duty in respect of paving, in so far as related to its private right of way, was determined, as a matter of contract, binding on and not subject to be impaired by the City, by the terms of the dedications by which such right of way and the adjacent street were granted, as they were afterwards included in the city limits, and upon the faith of which the company had extended its line.

(3) That the company's right to due process, under the Fourteenth Amendment, was violated, by a refusal of the courts below to permit it to prove that the paving of the boulevard did and could confer no benefit whatever upon the right of way in question.

Mr. D. A. Richardson, with whom *Mr. Russell G. Lowe*, *Mr. T. G. Chambers*, *Mr. B. A. Ames* and *Mr. Streeter B. Flynn* were on the brief, for defendants in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

In 1909 the owners platted Linwood Place, adjacent to Oklahoma City, for building lots, streets, etc. To procure extension of a street car line therein, they dedicated a strip forty feet in width, lying along the center of what is now known as Linwood Boulevard, to plaintiff in error's predecessor, "its successors and assigns, with a like effect as though deeded and conveyed to said company in fee simple by separate deed," on condition, however, that the property should be subject to reasonable police regulations, that the grantee should construct crossings over the tracks and also put down curbing and pave the crossings whenever the boulevard itself should be paved. Subordinate to above grant the streets as shown on the plat were dedicated to the public for ordinary purposes of travel. Afterwards car tracks were laid in the center of the forty-foot strip and the corporate limits of Oklahoma City were extended to include Linwood Place.

In order to provide funds for paving the public roadways along Linwood Boulevard, the City undertook in 1910 to lay a tax upon the adjacent property, and directed that it be apportioned according to benefits. The Board of Commissioners apportioned to the central strip as its proper share of the expenses, $12,046.16. Instead of assessing this amount directly against the property, the City Council erroneously assessed it against the street car company. Thereafter, the City and the Severns Company, which had put down the paving, procured from the District Court of Oklahoma County a mandamus directing a re-assessment against the land itself, but a hearing upon objections thereto was not specifically provided for.

The Supreme Court of the State (67 Oklahoma, —) declared: "The fee title to the strip of land in question

here appears to be in the railway company. . . . Its right is not merely an intangible privilege or an easement, but under the terms of the dedication is a fee simple title. . . . The dominion and control of the strip of land in question here is not in the city authorities. If the street should be vacated by the city authorities, this private right of way would not revert to the abutting owners, but would continue to be the property of the railway company. The company took the fee from the original grantors by the dedication before the abutting owners acquired their titles." It then held the land was subject to assessment according to benefits resulting from the paving, and "that when the commissioners proceed in obedience to the decree of the court to reassess the property of the railway company, an opportunity will be given the company to be heard and to complain or object to the amount of the assessment." Nevertheless, it ordered an affirmance of the judgment of the trial court, without more, and by so doing left in serious doubt the right of plaintiff in error to a new and adequate hearing in respect of the assessment. We think, therefore, that the judgment below should be modified and corrected so as definitely to preserve such right. So modified, it is affirmed. The costs here will be equally divided.

The terms and conditions in the original franchise granted by Oklahoma City to the plaintiff in error, which require it, under given conditions, to pave or pay for paving certain portions of occupied streets, are not applicable in the circumstances here presented and cannot be relied upon to defeat the assessment now in question. The land supposed to be benefited belongs to the company; the City has made no contract which prevents imposition upon it of a fair share of the cost of beneficial improvements. *Louisville & Nashville R. R. Co.* v. *Barber Asphalt Paving Co.*, 197 U. S. 430.

Modified and affirmed.